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April 7, 2004

VIA ELECTRONIC MAIL AND FIRST-CLASS MAIL SERVICE

The Honorable Bruce Duke
Executive Director
South Carolina Public Service Commission
Post Office Drawer 11649
Columbia, South Carolina 29211

RE: BellSouth Telecommunications, Inc. vs. NewSouth Communications Corp.
Docket No. 2004-0063-C, Our File No. 802-10227

Dear Mr. Duke:

Enclosed is the original and ten (10) copies of **NewSouth Communications Corp.'s Answer and Opposition to BellSouth Telecommunications, Inc.'s Complaint and Request for Summary Disposition Against NewSouth Communications Corp.** for filing in the above-referenced matter.

Please acknowledge your receipt of this document by file-stamping the copy of this letter enclosed, and returning it in the enclosed envelope. By copy of this letter, I am serving all parties of record and enclose my certificate of service to that effect.

If you have any questions or need additional information, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,

/S/

John J. Pringle, Jr.

JJP/cr
cc: Catherine Carroll, Esquire
all parties of record
Enclosures
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BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2004-0063-C

BellSouth Telecommunications, Inc.	)
	)
Petitioner,	)
	)
vs.	)
	)
NewSouth Communications Corp.	)
	)
Defendant.	)
	)

NEWSOUTH COMMUNICATIONS CORP.'S ANSWER AND OPPOSITION TO BELLSOUTH TELECOMMUNICATION, INC.'S COMPLAINT AND REQUEST FOR SUMMARY DISPOSITION AGAINST NEWSOUTH COMMUNICATIONS CORP.

NewSouth Communications Corp. ("NewSouth") by its attorneys hereby answers the Complaint and Request for Summary Disposition of BellSouth Telecommunications, Inc. ("BellSouth") filed before the Public Service Commission of South Carolina[1] and states as follows:

SUMMARY

BellSouth's Complaint seeks to elevate into a breach of contract NewSouth's reasonable refusal to comply with BellSouth's unlawful audit request. As determined by the Public Staffs in two state proceedings addressing this precise question (including one in Georgia, whose law governs the Agreement)[2/] and contrary to BellSouth's assertions here, BellSouth does not have

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[1] BellSouth's Complaint and Request for Summary Disposition Against NewSouth was filed on March 5, 2004 ("BellSouth Complaint" or "Complaint").

[2/] *See In re Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Georgia Public Service Commission, Docket No. 12778-U, *Recommended Decision*, at 7-9 (Feb. 11, 2004) ("*NuVox Decision*"); *In re Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications,*

an unqualified right to audit. Instead, it must comply with very specific limitations imposed on audits by the Federal Communications Commission ("FCC") in the *Supplemental Order Clarification*.[3/]

Those limitations were imposed by the FCC in an attempt to ensure that competitive LECs could fully enjoy their rights under the Act to enhanced extended loops ("EELs") without being subject to retaliatory or punitive audits by ILECs for the assertion of such rights. *See Supplemental Order Clarification* ¶¶ 29-32; *Triennial Review Order* ¶¶ 614, 622, 626.[4/] Specifically, the *Supplemental Order Clarification* allows incumbent LECs to "conduct limited audits *only* to the extent reasonably necessary to determine a requesting carrier's compliance with the local usage options." *Supplemental Order Clarification* ¶ 29 (emphasis added). Moreover, the *Supplemental Order Clarification* directs that "[a]udits will not be routine practice" and are only to be requested when "the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service." *Supplemental Order Clarification* ¶ 31 n.86; *see also Triennial Review Order* ¶ 622 (permitting audits only when "cause" exists). Furthermore, the audits must be conducted by an "independent

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Inc., Georgia Public Service Commission, Docket No. 12778-U, *Public Staff Memorandum,* at 4-5 (Mar. 29, 2004) ("*Georgia Staff Memorandum*"); *In the Matter of BellSouth Telecommunications, Inc. v. NewSouth Communications Corp.*, North Public Utilities Commission, Docket No. P-772, Sub 7, *Comments of Public Staff*, at 2-3 (Mar. 8, 2004) ("*North Carolina Public Staff Comments*").

3/ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587, ¶¶ 29-32 (2000) ("*Supplemental Order Clarification*"), *aff'd sub nom. Competitive Telecommunications Ass'n v. FCC,* 309 F.3d 8 (D.C. Cir. 2002); *see also NuVox Decision* at 7-9, *Georgia Public Staff Memorandum* at 4-5; *North Carolina Public Staff Comments* at 2-3.

4/ *In the Matter of Review of the Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers*, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 18 FCC Rcd 16978, ¶ 614 (2003) ("*Triennial Review Order*") (rejecting the *Supplemental Order Clarification*'s usage-based eligibility requirements as inferior because of measuring difficulties and the potential for burdensome audits), *vacated and remanded in part on other grounds by U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

auditor." *Supplemental Order Clarification* ¶ 31. These protections serve the vital purpose, as the FCC has recognized, of preventing incumbents from wielding the inherently burdensome audit mechanism as a weapon against competitive local exchange carriers ("CLECs") such as NewSouth that exercise their rights to EELs. *See Supplemental Order Clarification* ¶¶ 29-32; *Triennial Review Order* ¶¶ 614, 626 (recognizing burdensome nature of audits).

BellSouth seeks in this Complaint to escape the strictures of the *Supplemental Order Clarification* by contending that the Parties voluntarily negotiated around the audit requirements imposed by that Order and thus it is not required to comply with those requirements. BellSouth's attempt to avoid application of the *Supplemental Order Clarification*'s requirements is entirely unsurprising because BellSouth simply cannot demonstrate that it has satisfied those requirements. Specifically, despite the fact that routine audits are specifically prohibited by the *Supplemental Order Clarification*,[5/] BellSouth sent out a form letter notifying more than a dozen carriers, including NewSouth, of BellSouth's intent to audit EELs. Moreover, BellSouth failed to identify any concern that NewSouth's EELs were not in compliance until confronted by NewSouth with its failure to do so. When BellSouth finally proffered the required justification for the audit, the information on which BellSouth relied actually confirmed NewSouth's compliance with the applicable eligibility requirements or was entirely nonprobative. Finally, the entity selected by BellSouth to conduct the audit is, upon information and belief, an incumbent LEC consulting shop that advertises its ability to generate revenue for incumbents by finding noncompliance and can thus cannot satisfy the *Supplemental Order Clarification*'s requirement that any audit be conducted by an "independent auditor." *Supplemental Order Clarification* ¶ 31.

5/ *Supplemental Order Clarification* ¶ 31 n.86.

BellSouth's contention that the *Supplemental Order Clarification* audit requirements do not apply because the Parties entered into a voluntary interconnection agreement ("Agreement") pursuant to Section 252 of the 1996 Act is utterly meritless. BellSouth states that Section 252(a)(1) permits parties to enter into voluntary agreements without regard to the standards of Section 251 or the FCC's implementing rules and orders. *See, e.g.*, BellSouth Complaint ¶¶ 34-36. First, whatever Section 252 generally authorizes, the terms of the Agreement negotiated by the Parties themselves require compliance with Sections 251 and 252 of the Act, including Section 251(c)(3), and the FCC's rules and orders, including the *Supplemental Order Clarification.* The explicit language of the Agreement states that BellSouth will provide NewSouth access to combinations, including EELs, "[s]ubject to applicable and effective FCC Rules and Orders," which, of course, includes the *Supplemental Order Clarification*. *See* Agreement, Att. 2, § 1.5, Exh. A; *see also* Agreement, Att. 2, § 1.1, Exh. A; Agreement, Preamble, Exh. A; Agreement, General Terms and Conditions, § 1, Exh. A. Second, under well-recognized contract principles, the Parties are presumed to contract under existing laws unless the Agreement specifically provides otherwise (which it plainly does not), and the *Supplemental Order Clarification*'s audit protections are thus incorporated into the Agreement by operation of law. Indeed, as noted above, in two state proceedings (one in Georgia whose law governs the contract) that have already addressed the question of whether the *Supplemental Order Clarification*'s audit requirements apply to BellSouth under audit language substantively identical to that at issue here, a hearing officer and the public staffs have determined that the *Supplemental Order Clarification* is incorporated into the Agreement and its audit requirements thus apply. Moreover, controlling precedent in the Fourth Circuit, not even cited by BellSouth,

holds that voluntarily negotiated provisions in interconnection agreements that track applicable law must be read consistent with that law.[6/]

In fact, as set forth in this Answer, it appears that BellSouth itself initially recognized that its audit rights are constrained by the *Supplemental Order Clarification*. In its initial audit request to NewSouth, BellSouth stated that it was seeking an audit pursuant to that Order. BellSouth also represented to the FCC, in providing the notice required under the *Supplemental Order Clarification,* that it was conducting the audit pursuant to that Order and that it made the audit request because it had legitimate concerns. BellSouth did not inform the FCC that it was requesting an audit because it had an unqualified right to do so. Only when confronted with its failure to comply with the *Supplemental Order Clarification* safeguards did BellSouth manufacture an argument that the audit provisions in the Agreement gave it an unrestricted right to conduct audits. It is thus apparent that the *Supplemental Order Clarification* requirements do apply to BellSouth, and the Commission should reject BellSouth's claim that it has an unqualified audit right. In addition, even were BellSouth not subject to the *Supplemental Order Clarification* requirements, as it is, NewSouth would not have been in breach of the Agreement for rejecting BellSouth's audit demand because, as set forth in this Answer, BellSouth's audit request asserted rights found only in the *Supplemental Order Clarification* and not the Agreement. Thus, even under BellSouth's theory of the case, which does not recognize the incorporation of the *Supplemental Order Clarification* requirements, its audit request was unlawful.

It is apparent, as set forth in this Answer, that BellSouth has failed to demonstrate that it has complied with the threshold requirements necessary for it to obtain an audit, and NewSouth

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6/ *AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc.,* 229 F.3d 457, 465-66 (4th Cir. 2000) (*"BellSouth Decision*").

thus respectfully requests that the Commission deny BellSouth's requested relief. If, however, the Commission is unwilling to conclude at this stage that BellSouth's claims are entirely barred, it must deny BellSouth's request for summary disposition since BellSouth certainly cannot be deemed to have demonstrated as a *matter of law* that it complied with the *Supplemental Order Clarification* requirements, particularly in light of the evidence submitted by NewSouth in this Answer demonstrating that:

- BellSouth's audit requests were "routine";
- BellSouth's audit requests were motivated by an intent to impede BellSouth's competitors;
- BellSouth's purported concerns that NewSouth's EELs were not in compliance with applicable eligibility criteria are invalid, insufficient and procedurally unsupported and improper; and
- The entity chosen by BellSouth to conduct the audit was not an "independent auditor.

At a minimum, thus, NewSouth's Answer has raised questions of law and fact that should be addressed before this Commission in a full hearing after discovery has been conducted as to BellSouth's unsupported factual claims.

RESPONSES TO NUMBERED PARAGRAPHS

FIRST DEFENSE

For the reasons set forth in this response, the Complaint fails to state a claim against NewSouth upon which relief can be granted and should therefore be dismissed.

SECOND DEFENSE

Without conceding the relevance of any of the allegations made in BellSouth's Complaint, and without admitting any allegations other than those specifically indicated below, NewSouth hereby responds to the numbered paragraphs as follows:

PARTIES

1. Upon information and belief, NewSouth admits the allegations in Paragraph 1 of the Complaint.

2. NewSouth admits the allegations in Paragraph 2 of the Complaint.

3. NewSouth admits that it is an integrated service provider offering local and long distance voice and data services primarily to small and mid-sized businesses in the state of South Carolina and throughout BellSouth's service territory in the Southeast, specifically Alabama, Georgia, Florida, Kentucky, Louisiana, Mississippi, North Carolina, and Tennessee. Jennings Aff. ¶ 3, Exh. L. NewSouth's service offering to customers includes the provision of local services to its customers. NewSouth is thus in the business of providing local service. Jennings Aff. ¶ 3, Exh. L. NewSouth provides these services via a high-speed network consisting of the following main elements: (1) self-deployed voice and data switches; (2) multiplexing and related equipment located in 80 collocation arrangements; (3) back office billing and customer care platforms; (4) electronic operation support system bonding; and (5) leased intercity/interLATA fiber backbone. Jennings Aff. ¶ 3, Exh. L. NewSouth connects this network to customers through BellSouth (and other incumbent LEC facilities), specifically using: (1) BellSouth facilities between a NewSouth collocation site and the customer's premises either in the form of unbundled DS1 loops and/or EELs or special access; and (2) transport from the collocation site to a NewSouth switch utilizing backhaul facilities on incumbent LEC non-UNE facilities or alternative third-party providers where available. Jennings Aff. ¶ 3, Exh. L.

JURISDICTION

4. NewSouth admits the allegations set forth in Paragraph 4.

SUMMARY OF THE ACTION

5. NewSouth denies the allegations set forth in Paragraph 5 and specifically denies that BellSouth is entitled to relief requested for the reasons set forth in this Answer. BellSouth is entitled to conduct an audit only if its audit request complies with the rules governing such audits as set forth in the FCC's *Supplemental Order Clarification*. The *Supplemental Order Clarification* makes clear that audits may not be "routine practice," but may only "be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service." *Supplemental Order Clarification* ¶ 31 n.86. Under that *Order*, "incumbent LECs may conduct limited audits *only* to the extent reasonably necessary to determine a requesting carrier's compliance with the local usage options." *Supplemental Order Clarification* ¶ 29 (emphasis added). That *Order* also makes clear that any such audit of converted EELs must be performed by an independent third party auditor that is hired and paid for by the incumbent. *Supplemental Order Clarification* ¶ 31. BellSouth explicitly bound itself to comply with these requirements. *See*, *e.g.,* Agreement, Att. 2, § 1.5, Exh. A (BellSouth's provisions of UNE combinations are "[s]ubject to applicable and effective FCC Rules and Orders," including the *Supplemental Order Clarification*); *see also* Agreement, Att. 2, § 1.1, Exh. A ("This Attachment sets forth the unbundled network elements and combinations of unbundled network elements that BellSouth agrees to offer to NewSouth in accordance with its obligations under Section 251(c)(3) of the Act."); Preamble, Agreement, General Terms and Conditions, Exh. A (stating the Parties' desire to "interconnect their facilities, purchase network elements and other services, and exchange traffic specifically for the purpose of fulfilling their obligations pursuant to sections 251 and 252 of the Telecommunications Act of 1996."); Agreement, General Terms and Conditions, § 1, Exh. A (providing that "the Parties agree that the rates, terms and conditions contained within this Agreement, including all

Attachments, *comply and conform* with each Parties' obligations under Sections 251 and 252 of the Act.") (emphasis added). BellSouth initially proffered its audit request pursuant to the *Supplemental Order Clarification*. *See generally* April 26, 2002 BellSouth Letter, Exh. B. Only after NewSouth raised legitimate concerns about BellSouth's compliance,[7/] did BellSouth begin to assert that it had an unqualified right to audit – which it does not. *See, e.g.,* June 6, 2002 BellSouth Letter at 1, Exh. G. NewSouth admits that, to date, it has refused to submit to BellSouth's audit demand. NewSouth denies the remaining allegations set forth in Paragraph 5, and specifically denies that NewSouth's refusal to concede to BellSouth's unqualified demands for an audit constitutes a violation of the Agreement or of the *Supplemental Order Clarification*. Even if the *Supplemental Order Clarification* requirements were not incorporated and BellSouth had not failed to satisfy them, NewSouth would not have been in breach for refusing BellSouth's audit request. This is true because the audit request contained audit demands not provided for by the Agreement under BellSouth's theory of the case (*e.g.*, demanding reimbursement by NewSouth if the audit found noncompliance and requiring NewSouth to maintain records)[8/] – but only by the *Supplemental Order Clarification*. *See, e.g.*, *Supplemental Order Clarification* ¶¶ 31-32; BellSouth Complaint ¶ 39 (conceding that only the *Supplemental Order Clarification* provides a right to reimbursement of audit costs when noncompliance is found); April 26, 2002 BellSouth Letter at 1-2, Exh. B (demanding reimbursement and the maintenance of records). NewSouth also denies that its refusal to consent to the specific audit demands levied by BellSouth leaves BellSouth without recourse to validate the self-certifications provided by NewSouth. BellSouth can readily obtain such validation by demonstrating a legitimate basis for the audit, identifying an independent auditor, and reasonably bounding the scope and framework

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7/ *See* May 23, 2002 NewSouth Letter at 1-2, Exh. F.

8/ *See* April 26, 2002 BellSouth Letter at 1-2, Exh. B.

for its desired audit. NewSouth has in fact repeatedly attempted to come to such an agreement with BellSouth. *See, e.g.,* May 23, 2002 NewSouth Letter at 2, Exh. F., June 29, 2002 NewSouth Letter at 1-2, Exh. I; August 7, 2002 NewSouth Letter at 3, Exh. K. NewSouth admits that BellSouth notified NewSouth of BellSouth's intent to audit NewSouth's EELs.

6. NewSouth admits that, to date, it has refused to submit to BellSouth's audit demand. NewSouth denies the remaining allegations set forth in Paragraph 6, and specifically denies that its refusal to submit to Bellsouth's request constitutes a breach of the Agreement for the reasons set forth in this Answer.

FACTS

The Parties' Interconnection Agreement

7. NewSouth admits the allegations contained in the first sentence of Paragraph 7. NewSouth also admits that the Agreement provisions quoted by BellSouth in Paragraph 7 of the Complaint have been cited accurately. NewSouth denies the allegations set forth in Paragraph 7, to the extent that it suggests that the Agreement limited or altered application of the requirements set forth in the FCC's *Supplemental Order Clarification* for the reasons set forth in this Answer. Any remaining allegations are denied unless specifically admitted.

8. NewSouth admits that the Agreement incorporates in full the self-certification options, requirements and qualifying criteria set forth in the FCC's *Supplemental Order Clarification*. NewSouth denies the allegations set forth in Paragraph 8, to the extent that it suggests that the Agreement limited or altered application of the requirements set forth in the FCC's *Supplemental Order Clarification* for the reasons set forth in this Answer. Any remaining allegations are denied unless specifically admitted.

9. NewSouth admits that the FCC established three "safe harbor" options that allow requesting carriers to self-certify to incumbent LECs that their converted circuits are in

compliance with the FCC's use restrictions and qualifying criteria, including compliance with a minimum percentage of local exchange service (which varies for each safe harbor option) for the converted circuits. *Supplemental Order Clarification* ¶ 22. NewSouth also admits that the Agreement specifies a fourth self-certification option (so-called "Option 4"). NewSouth denies the remaining allegations set forth in Paragraph 9, including any suggestion that NewSouth converted any circuits pursuant to Option 4. *See* Jennings Aff. ¶ 11, Exh. L. All of NewSouth's circuits were converted pursuant to the second self-certification option under the *Supplemental Order Clarification* ("Option 2"), and thus NewSouth denies that any eligibility criteria other than those appropriate under Option 2 (requiring 10 percent local usage) apply to the circuits at issue in this proceeding. Jennings Aff. ¶ 11, Exh. L.

10. NewSouth admits only that the Agreement specifies a provision that refers to the so-called Option 4 conversions and that the Agreement language quoted in Paragraph 10 of the Complaint is accurately cited. NewSouth denies the allegations set forth in Paragraph 10, to the extent that it suggests that NewSouth converted any circuits pursuant to Option 4. Jennings Aff. ¶ 11, Exh. L . NewSouth also denies the allegations set forth in Paragraph 10, to the extent that it suggests that definition of "local voice traffic" set forth for Option 4 circuits is relevant in this proceeding since, as stated in Paragraph 9 above, all circuits at issue in this proceeding were converted under Option 2. Jennings Aff. ¶ 11, Exh. L. Any remaining allegations are denied unless specifically admitted.

11. NewSouth admits that the Agreement preserves the three "safe harbor" options that allow requesting carriers to self-certify to incumbent LECs that their converted circuits are in compliance with the FCC's use restrictions and qualifying criteria, as set forth in the *Supplemental Order Clarification*. NewSouth also admits that the Agreement specifies a fourth

self-certification option ("Option 4"). Finally, NewSouth admits that the Agreement language (quoted) in Paragraph 11 of the Complaint has been accurately cited. NewSouth denies the allegations set forth in Paragraph 11, to the extent that it suggests that NewSouth converted any circuits pursuant to Option 4. Jennings Aff. ¶ 11, Exh. L. NewSouth also denies the allegations set forth in Paragraph 11, to the extent that it suggests that the Agreement limited or altered any application of the requirements set forth in the FCC's *Supplemental Order Clarification* for the reasons set forth in this Answer. Any remaining allegations are denied unless specifically admitted.

12. NewSouth admits that the Agreement provision quoted by BellSouth in Paragraph 12 of the Complaint has been cited accurately. NewSouth denies that the Agreement provides BellSouth an unqualified right to audit new and converted EELs without regard to the procedures and requirements of the FCC's *Supplemental Order Clarification*. NewSouth admits that BellSouth explicitly agreed to provide EELs subject to the FCC's rules and orders, including the *Supplemental Order Clarification*. *See* Agreement, Att. 2, § 1.5, Exh. A (BellSouth's provisions of UNE combinations are "subject to applicable and effective FCC Rules and Orders," including the *Supplemental Order Clarification*); *see also* Agreement, Att. 2, § 1.1, Exh. A ("This Attachment sets forth the unbundled network elements that BellSouth agrees to offer to NewSouth in accordance with its obligations under Section 251(c)(3) of the Act."); Preamble, Agreement, Exh. A (stating the Parties' desire to "interconnect their facilities, purchase network elements and other services, and exchange traffic specifically for the purpose of fulfilling their applicable obligations pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 ("the Act")."); Agreement, General Terms and Conditions, § 1, Exh. A (providing that "the Parties agree that the rates, terms and conditions contained within this Agreement, including all

Attachments, *comply and conform* with each Parties' obligations under Sections 251 and 252 of the Act.") (emphasis added). Any remaining allegations are denied unless specifically admitted. The audit requirements set forth in the *Supplemental Order Clarification* are also incorporated into the Agreement by operation of law. *See infra* Legal Analysis.

13. NewSouth admits only that the Agreement provision quoted by BellSouth in Paragraph 13 of the Complaint has been cited accurately. NewSouth denies the allegations set forth in Paragraph 13 to the extent that it states that the Agreement provides BellSouth an unqualified right to audit new and converted EELs without regard to the procedures and requirements of the FCC's *Supplemental Order Clarification*. NewSouth denies the allegations set forth in Paragraph 13 that "there are no qualifications on BellSouth's right to audit, whether set forth in the *Supplemental Order Clarification* or elsewhere, other than that BellSouth provide 30 days notice and that BellSouth incur the cost of the audit." *See*, *e.g.*, May 23, 2002 NewSouth Letter at 1-2, Exh. L; June 29, 2002 NewSouth Letter at 1, Exh. I; August 7, 2002 Letter at 2-3, Exh. K. NewSouth admits that the FCC's *Supplemental Order Clarification* gives BellSouth a right to conduct limited audits of circuits it has converted from special access to EELs. As noted herein, the *Supplemental Order Clarification* Order requires that: (1) audits will not be routine practice and may only be conducted under limited circumstances and only when the incumbent LEC has a reasonable concern that a requesting carrier is not meeting the qualifying criteria; and (2) that such an audit must be performed by an independent third party which is hired and paid for by the incumbent LEC. *Supplemental Order Clarification* ¶¶ 29-31, n.86. BellSouth's compliance with these requirements is certainly a threshold issue that must be resolved prior to the commencement of any audit as set forth in this Answer. For the reasons explained in the Legal Analysis set forth herein, the explicit reference to the audit requirements of the

Supplemental Order Clarification in Section 4.5.2.2 of the Agreement does not demonstrate that NewSouth waived such requirements elsewhere. *See infra* Legal Analysis. *See also* Agreement, Att. 2, § 4.5.2.2, Exh. A. Any remaining allegations are denied unless specifically admitted.

The *Supplemental Order Clarification*

14. NewSouth admits that the FCC issued the *Supplemental Order Clarification* on June 2, 2000 and that the provision quoted by BellSouth in Paragraph 14 of the Complaint has been cited accurately. Otherwise, to the extent that Paragraph 14 contains interpretations or statements of law, no response is required. NewSouth's analysis of the FCC's *Supplemental Order Clarification* is addressed in the Legal Analysis section of this Answer.

15. NewSouth denies the allegations set forth in Paragraph 15 because BellSouth has failed to state the allegations with appropriate completeness. As noted above, although the FCC's *Supplemental Order Clarification* gives BellSouth a right to conduct audits of circuits it has converted from special access to EELs, those audit rights are carefully circumscribed in order to protect competitive carriers from abusive and burdensome audits. *See, e.g., Supplemental Order Clarification* ¶¶ 29-32; *Triennial Review Order* ¶¶ 614, 622, 626. To the extent that Paragraph 15 contains interpretations or statements of law, no response is required. NewSouth's analysis of the FCC's *Supplemental Order Clarification* is addressed in the Legal Analysis section of this Answer.

16. NewSouth denies that the first sentence of Paragraph 16 in BellSouth's Complaint correctly quotes the *Supplemental Order Clarification*. That Order actually states that "[i]n order to confirm reasonable compliance with the local usage requirements in this Order, we also finds that incumbent LECs may conduct limited audits only to the extent *reasonably* necessary to determine a requesting carrier's compliance with the local usage options." *Supplemental Order*

Clarification ¶ 29 (text omitted from BellSouth quote in italics). NewSouth admits that the second sentence of Paragraph 16 accurately quotes portions of the *Supplemental Order Clarification*. Otherwise, to the extent that Paragraph 16 contains interpretations or statements of law, no response is required. NewSouth's analysis of the FCC's *Supplemental Order Clarification* is addressed in the Legal Analysis section of this Answer.

17. NewSouth admits that the first sentence of Paragraph 17 accurately quotes a portion of the *Supplemental Order Clarification.* However, the quote cited by BellSouth is incomplete. The *Supplemental Order Clarification* makes clear that an "audit should not impose an undue financial burden on smaller requesting carriers that may not keep extensive records, and find[s] that, in the event of an audit, the incumbent LEC should verify compliance for these carriers using the records that the carriers keep in the normal course of business." *Supplemental Order Clarification* ¶ 32. NewSouth denies that BellSouth does not conduct routine audits for the reasons set forth in this Answer. In any event, to the extent that Paragraph 17 contains interpretation or statements of law, no response is required. NewSouth's analysis of the FCC's *Supplemental Order Clarification* is addressed in the Legal Analysis section of this Answer.

18. To the extent that Paragraph 18 contains interpretation or statements of law, no response is required. However, NewSouth notes that the FCC was only referring to interconnection agreements in existence at the time the *Supplemental Order Clarification* was released, not subsequent contracts such as the Parties' Agreement. NewSouth's analysis of the FCC's *Supplemental Order Clarification* is addressed in the Legal Analysis section of this Answer.

NewSouth's Loop and Transport Combinations

19. NewSouth admits that it is entitled order new EELs pursuant to the amendments cited. To the extent that Paragraph 19 contains interpretation of law no response is required, and

NewSouth specifically denies that BellSouth is entitled to audit NewSouth's new EELs. *See e.g.,* June 29, 2002 NewSouth Letter at 1, Exh. I; August 7, 2002 NewSouth Letter at 1, Exh. K. Any remaining allegations are denied unless specifically admitted.

20. NewSouth admits the allegations set forth in Paragraph 20. NewSouth also admits that its self-certifications and requests to convert a number of circuits from special access to UNEs were made pursuant to Option 2 of the FCC's *Supplemental Order Clarification*. Jennings Aff. ¶ 11, Exh. L. NewSouth further admits that it complied with BellSouth's conversion procedures and BellSouth converted circuits only after it satisfied itself that NewSouth had complied with BellSouth's conversion qualification requirements.

21. NewSouth admits the first two sentences of Paragraph 21. BellSouth, however, failed to convert circuits in a timely fashion as required by the *Supplemental Order Clarification.* In many cases, BellSouth failed to convert for hundreds of days properly submitted conversion requests. BellSouth's failure to address the untimely conversions and its stated position that there was no obligation in the Agreement to timely convert circuits prompted NewSouth to file a complaint against BellSouth at the FCC, which is pending. *See In the Matter of NewSouth Communications Corp. v. BellSouth Telecommunications*, File No. EB-03-MD-012. After the complaint was filed, BellSouth stipulated to a payment to NewSouth of nearly $850,000 for conversion delays exceeding 37 days – BellSouth's internal conversion target. Upon information and belief, BellSouth's aggressive and vexatious audit litigation, filed or threatened to be filed in at least five states, is in direct retaliation for NewSouth filing its FCC complaint. NewSouth objects to and moves to strike BellSouth's statement that it did not invoke its audit right "[w]ith respect to the Option 4 conversions"[9/] in that BellSouth has not alleged that there were any

9/ BellSouth Complaint ¶ 21.

Option 4 conversions nor has it proffered any evidence of such conversions. NewSouth denies that any circuits were appropriately converted under Option 4. Jennings Aff. ¶ 11, Exh. L.

BellSouth and NewSouth Correspondence Regarding the Audit Request

22. NewSouth admits that BellSouth sent a letter dated April 26, 2002, the contents of which are set forth in Exhibit B. In that letter, BellSouth invoked audit rights pursuant to the *Supplemental Order Clarification,* not the Parties' Agreement. *See generally* April 26, 2002 BellSouth Letter, Exh. B. By copying the FCC on this letter, BellSouth informed the FCC, pursuant to the notice requirement of the *Supplemental Order Clarification,* that BellSouth intended to conduct an audit in compliance with limited audit requirements of the *Supplemental Order Clarification. See* April 26, 2002 BellSouth Letter at 2, Exh. B; *Supplemental Order Clarification* ¶ 31. Nowhere in this letter does BellSouth inform NewSouth or the FCC that BellSouth intends to seek an audit without regard to the limitations set forth in the *Supplemental Order Clarification. See generally* April 26, 2002 BellSouth Letter, Exh. B. Specifically, in its letter to NewSouth, BellSouth stated a desire "to verify NewSouth's local usage certification and compliance with the significant local usage requirements of the FCC Supplemental Order." *See* April 26, 2002 BellSouth Letter at 1, Exhibit B. NewSouth denies that the entity identified in the letter to conduct the audit, American Consultants Alliance ("ACA"), is independent or qualifies as an auditor. *See infra* Legal Analysis; *see, e.g.,* May 23, 2002 NewSouth Letter at 2, Exh. F; June 29, 2002 NewSouth Letter at 1, Exh. I; August 7, 2002 NewSouth Letter at 3, Exh. K. Upon information and belief, BellSouth notified over a dozen carriers that it intended to have ACA conduct an audit of their converted EELs. *See Ex Parte* Notices from Whit Jordan, BellSouth, to the FCC, CC Docket No. 96-98, June 20, 2002, attached hereto as Exhibit C, and June 24, 2002, attached hereto as Exhibit D. Any remaining allegations are denied unless specifically admitted.

23. New South admits that, on May 3, 2002, it sent a letter to BellSouth responding to the audit request. The content of the letter is set forth in Exhibit E attached hereto. NewSouth denies that it either agreed to the audit request articulated in BellSouth's April 26, 2002 Letter, or conceded that BellSouth's initial request met the requirements set forth in FCC's *Supplemental Order Clarification*. *See*, *e.g.,* June 29, 2002 NewSouth Letter at 1, Exh. I. Any remaining allegations are denied unless specifically admitted.

24. NewSouth admits that, on May 23, 2002, it sent a letter to BellSouth formally disputing BellSouth's request to audit special access circuits that had been converted to unbundled loop/transport combinations. The content of the letter is set forth in Exhibit F attached hereto. During May of 2002, NewSouth's concerns about whether BellSouth met the threshold restrictions needed to conduct an audit grew considerably as NewSouth: (1) discovered that BellSouth filed a rash of virtually identical audits against competitors; and (2) that ACA was an ILEC consulting shop. *See* May 23, 2002 NewSouth Letter at 1-2, Exh. F (citing *Petition for Declaratory Rulemaking of NuVox, Inc.*, Docket No. 96-98 (May 17, 2002) ("*NuVox Petition*"), subsequently dismissed as moot following issuance of the *Triennial Review Order, see* FCC 04-85 (rel. April 5, 2004)). As a result, NewSouth rejected BellSouth's initial audit request but invited BellSouth to renew its request once the incumbent LEC demonstrated compliance with the *Supplemental Order Clarification.* *See* May 23, 2002 NewSouth Letter at 2, Exh. F. Other competitive carriers also raised similar concerns regarding BellSouth's audit request. *See, e.g., NuVox Petition* at 1-7; *Joint Comments of WorldCom, Inc. and the Competitive Telecommunications Association*, CC Docket No. 96-98, 10-11 (July 3, 2002) ("*WorldCom Comments, NuVox Petition*"); *Joint Comments of Cbeyond Communications, LLC, ITC^DeltaCom Communications, Inc., KMC Telecom Holding, Inc.; NewSouth Communications*

Corp., and XO Communications, Inc., CC Docket No. 96-98, 7-8 (July 3, 2002) ("*Joint Comments, NuVox Petition*"); *see also* May 23, 2002 NewSouth Letter at 1-2, Exh. F; June 29, 2002 NewSouth Letter at 1, Exh. I; August 7, 2002 NewSouth Letter at 2-3, Exh. K. NewSouth denies the remaining allegations set forth in Paragraph 24, to the extent that they suggest that the terms of the Agreement provide BellSouth with an unqualified right to conduct an audit without regard to the requirements set forth in the FCC's *Supplemental Order Clarification* for the reasons set forth in this Answer. NewSouth admits that its letter did not discuss the Parties' Agreement because BellSouth's letter indicated that the audit would be conducted pursuant to the requirements and limitations set forth in the *Supplemental Order Clarification* and itself did not reference the Parties' Agreement. *See generally* April 26, 2002 BellSouth Letter, Exh. B.

25. NewSouth admits that, on June 6, 2002, BellSouth responded to NewSouth's May 23, 2002 letter. *See* June 6, 2002 NewSouth Letter, Exh. G. NewSouth also admits that although the letter contains BellSouth's self-serving statement that it does not conduct routine audits, the letter fails to note that BellSouth had issued form audit requests to more than a dozen competitive carriers on a near-simultaneous basis. *See generally* June 6, 2002 BellSouth Letter, Exh. G; *see also* June 20, 2002 BellSouth *Ex Parte*, Exh. C; June 24, 2002 *Ex Parte*, Exh. D. NewSouth denies that the *Supplemental Order Clarification* is not relevant to BellSouth's audit request. While NewSouth admits that the June 6, 2002 letter contained unsupported statements by BellSouth that it only conducted audits "when it believes that such an audit is warranted due to a concern that the local usage options may not be met," NewSouth denies that any such concern existed with respect to NewSouth. *See* June 6, 2002 NewSouth Letter at 1, Exh. G. *See infra* Legal Analysis; Jennings Aff. ¶¶ 5, 7-13, Exh. L. NewSouth also denies that BellSouth selected persons to conduct the audit that are either auditors or independent. *See, e.g.,* May 23,

2002, NewSouth Letter at 2, Exh. F; June 29, 2002 NewSouth Letter at 1, Exh. I; August 7, 2002 NewSouth Letter at 3, Exh. K; *see also NuVox Petition* at 6-7; *WorldCom Comments, NuVox Petition* at 10-11 (July 3, 2002); *Joint Comments*, *NuVox Proceeding* at 7-8 (July 3, 2002). *See infra* Legal Analysis. Any remaining allegations are denied unless specifically admitted.

26. NewSouth admits that, on June 27, 2002, BellSouth sent NewSouth a letter, the contents of which are attached hereto as Exhibit H and speak for themselves. Two days later, on June 29, 2002, NewSouth informed BellSouth that any assumption that "NewSouth is agreeable to proceeding with the proposed audit immediately is not correct." *See* June 29, 2002 NewSouth Letter at 1, Exh. I. In that letter, and in a subsequent letter from NewSouth dated August 7, 2002 (filed in response to a Letter from Jerry Hendrix to Jake Jennings on July 17, 2002, attached hereto as Exhibit J), NewSouth pointed out that BellSouth's purported concerns regarding NewSouth's noncompliance were in error. June 29, 2002 NewSouth Letter at 1, Exh. I; August 7, 2002 NewSouth Letter at 2-3, Exh. K. NewSouth also reiterated its position that, ACA's "predominant ILEC affiliations" fatally undermined its selection as an independent auditor under the *Supplemental Order Clarification*. *See* June 29, 2002 NewSouth Letter at 1, Exh. I. NewSouth further objected that, on information and belief, ACA was not a member of the AICPA, did not meet the AICPA standards for independence and could not reasonably be deemed an independent auditor. August 7, 2002 NewSouth Letter at 3, Exh. K. ACA's failure to comply with such standards does not comport with the FCC's determination an auditor "must perform its evaluation in accordance with the standards established by the [AICPA]."[10] Any remaining allegations are denied unless specifically admitted.

[10] *Triennial Review Order* ¶ 626.

27. NewSouth admits that the Parties exchanged several letters between June and September 2002 that demonstrated that they disagreed with respect to the restrictions that the FCC, in its *Supplemental Order Clarification*, placed on an incumbent's limited ability to audit converted EEL circuits. During this period, BellSouth attempted to expand the scope of its audit request to encompass new EELs, not just converted EEL circuits. *Compare* April 26, 2002 BellSouth Letter at 1, Exh. B (stating an intent to audit converted EELs) *with* June 6, 2002 Letter at 1-2, Exh. G (expanding scope of audit); *see also* June 27, 2002 BellSouth Letter at 1, Exh. H; June 29, 2002 NewSouth Letter at 1, Exh. I; July 17, 2002 BellSouth Letter at 1, Exh. J; August 7, 2001 NewSouth Letter at 1-2, Exh. K. NewSouth denies the allegations set forth in Paragraph 27, to the extent that they allege that either BellSouth demonstrated that it had a contractual right to an unqualified audit, or that NewSouth's actions constituted a breach of the Agreement for the reasons set forth in this Answer. Also, during this period, BellSouth filed an *ex parte* notices with the FCC (Exhibits C and D attached hereto), in which it represented that it hired an independent auditor to conduct audits "only when it has a concern that the safe harbors are not being met." *See generally* June 24, 2002 BellSouth *Ex Parte* (attached materials at 6), Exh. D. In a separate letter to NewSouth, however, BellSouth began to articulate its revised view that the Agreement gave it unfettered discretion to demand an audit without complying with the restrictions on audits set forth in the *Supplemental Order Clarification*. *See* June 6, 2002 BellSouth Letter, Exhibit J. Any remaining allegations are denied unless specifically admitted.

28. NewSouth denies the allegations set forth in Paragraph 28. NewSouth denies that its rejection of BellSouth's audit request constitutes a breach of the Agreement for the reasons set forth in this Answer. Even assuming that the Agreement gives BellSouth an unqualified audit right, which it does not as demonstrated herein, NewSouth's rejection of the audit request does

not constitute a breach of the Agreement. This is because BellSouth's audit request imposes demands on NewSouth that are found only in the *Supplemental Order Clarification*, not the Agreement, under BellSouth's theory of the case. For example, BellSouth's audit request demands that NewSouth pay for the costs of the audit if the audit finds noncompliance. *See*, *e.g.*, April 26, 2002 BellSouth Letter at 2, Exh. B. If the Agreement does not incorporate the *Supplemental Order Clarification* requirements, as BellSouth alleges,[11/] BellSouth had no contractual right to impose this demand on NewSouth and rejection of it cannot be a breach of the Agreement. *See*, *e.g.*, BellSouth Complaint at ¶ 39 (conceding that the ILEC right to reimbursement arises solely from the *Supplemental Order Clarification*); *see also* Agreement, Att. 2, § 4.5.1.5, Exh. A (providing no right to reimbursement). Similarly, BellSouth's assertion in its audit request that NewSouth was obligated to maintain records[12/] is based solely on a requirement imposed by the *Supplemental Order Clarification*[13/] and has no basis Section 4.5.1.5 of the Agreement. Agreement, Att. 2, § 4.5.1.5, Exh. A (imposing recordkeeping obligation). From October 2002 to May 2003, BellSouth let its audit request languish. In May 2003, BellSouth renewed its unfounded audit request, upon information and belief, in direct retaliation for a complaint filed by NewSouth at the FCC alleging that BellSouth failed to timely convert special access circuits to UNEs following the submission of valid requests. *See In the Matter of BellSouth Telecommunications, Inc. v. NewSouth Communications Corp.* (October 15, 2003) (withdrawn before file number assigned). BellSouth withdrew its audit request after the FCC requested briefing on its jurisdiction to consider BellSouth's Complaint, and BellSouth indicated its intent to instead file the same complaint in various states. *See In the Matter of BellSouth*

11/ *See, e.g.*, BellSouth Complaint ¶¶ 36, 38.

12/ *See*, *e.g.*, April 26, 2002 BellSouth Letter at 2, Exh. B.

13/ *Supplemental Order Clarification* ¶ 32.

Telecommunications, Inc., v. NewSouth Communications Corp., Letter from Lisa Foshee, BellSouth Counsel, to Michael Pryor, NewSouth Counsel, and copying FCC Enforcement Bureau Staff Members (Nov. 24, 2004) (indicating decision to withdraw FCC complaint and file in five states). Upon information and belief, BellSouth has engaged in vexatious litigation by filing, or threatening to file, virtually identical complaints in at least five states, including this Complaint in South Carolina.

BellSouth's Interpretation of the Agreement and the *Supplemental Order Clarification*

29. NewSouth denies the allegations set forth in Paragraph 29 for the reasons set forth in this Answer. NewSouth specifically denies that BellSouth complied with the Agreement's requirement to pay for the audit. BellSouth's audit request demands that *NewSouth* pay for the audit if found in noncompliance, *see* April 26, 2002 BellSouth Letter at 2, Exh. B. Under BellSouth's current theory of the case, which asserts that the *Supplemental Order Clarification* requirements do not apply unless expressly referenced, BellSouth had no basis on which to demand reimbursement. As BellSouth admits, "Section 4.5.1.5 states that BellSouth must pay the cost of any audit regardless of what the audit uncovers . . . whereas the *Supplemental Order Clarification* states that the competitive LEC must reimburse the ILEC for the cost of the audit 'if the audit uncovers non-compliance with the local usage options.'" BellSouth Complaint ¶ 39 (citing Agreement, Att. 2, § 4.5.1.5, Exh. A and quoting the *Supplemental Order Clarification* ¶ 31). Thus, under BellSouth's current theory of the case, under which the reimbursement requirement does not apply because Section 4.5.1.5 does not expressly reference the *Supplemental Order Clarification*, its audit request was blatantly unlawful. *See, e.g.*, BellSouth Complaint ¶ 22 (conceding that its audit request stated that "BellSouth would incur the costs of the audit (unless the auditors found NewSouth's circuits to be noncompliant")); April 26, 2002

BellSouth Letter at 2, Exh. B. Moreover, as set forth in this Answer, the sharp reversal in BellSouth's position with respect to its reimbursement rights establishes that its audit request was made pursuant to the *Supplemental Order Clarification*. *See infra* Legal Analysis.

30. To the extent Paragraph 30 contains statements of law, no response is required. In any event, NewSouth denies the allegations set forth in Paragraph 30 for the reasons set forth in this Answer. NewSouth specifically denies it has made any argument that the *Supplemental Order Clarification* "supercedes" the Agreement. By its express terms and the operation of Georgia law and federal court precedent, the Agreement incorporates and is subject to FCC rules and orders, including the *Supplemental Order Clarification. See, e.g.,* Agreement, Att. 2, § 1.5, Exh. A; *see also infra* Legal Analysis.

31. To the extent Paragraph 31 contains statements of law, no response is required. In any event, NewSouth denies the allegations set forth in Paragraph 31 for the reasons set forth in this Answer, and specifically denies that the Agreement grants BellSouth an unqualified audit right. NewSouth admits only that Paragraph 31 accurately quotes certain provisions of the Agreement. *See infra* Legal Analysis.

32. To the extent Paragraph 32 contains statements of law, no response is required. In any event, NewSouth denies the allegations set forth in Paragraph 32, for the reasons set forth in this Answer. NewSouth admits only that Paragraph 32 accurately quotes certain provisions of the Agreement. *See infra* Legal Analysis.

33. To the extent Paragraph 33 contains statements of law, no response is required. NewSouth admits that Paragraph 33 accurately quotes certain provisions of the Agreement. NewSouth denies all remaining allegations set forth in Paragraph 33 for the reasons set forth in this Answer. *See infra* Legal Analysis.

34. To the extent Paragraph 34 contains statements of law, no response is required. NewSouth admits that the Agreement is voluntarily negotiated Agreement but denies that the Parties did not intend to incorporate the requirements of the *Supplemental Order Clarification*. The Parties expressly agreed that BellSouth's obligations to provide combinations of UNEs would be subject to FCC rules and orders. *See* Agreement, Att. 2, § 1.5, Exh. A. NewSouth denies all remaining allegations set forth in Paragraph 34 for the reasons set forth in this Answer. *See infra* Legal Analysis

35. To the extent Paragraph 35 contains statements of law, no response is required. NewSouth admits only that BellSouth and NewSouth voluntarily negotiated the Agreement. NewSouth denies all remaining allegations set forth in Paragraph 35 for the reasons set forth in this Answer. *See infra* Legal Analysis.

36. To the extent Paragraph 36 contains statements of law, no response is required. NewSouth denies the allegations set forth in Paragraph 36, for the reasons set forth in this Answer. *See infra* Legal Analysis. NewSouth specifically notes, however, that while expounding at length on out-of-circuit authority that is not on point, as discussed more fully in the Legal Analysis section, BellSouth fails to cite the Fourth Circuit's *BellSouth Decision* which is directly on point – supporting NewSouth's position that voluntarily negotiated provisions in interconnection agreements that track applicable law must be read consistent with that law.[14/] *See infra Legal Analysis.*

37. To the extent Paragraph 37 contains statements of law, no response is required. NewSouth denies the allegations set forth in Paragraph 37, for the reasons set forth in this Answer. *See infra* Legal Analysis.

14/ *BellSouth Decision* at 465-66

38. To the extent Paragraph 38 contains statements of law, no response is required. NewSouth denies the allegations set forth in Paragraph 38, for the reasons set forth in this Answer. *See infra* Legal Analysis.

39. To the extent Paragraph 39 contains statements of law, no response is required. NewSouth denies the allegations set forth in Paragraph 39, for the reasons set forth in this Answer. NewSouth notes that BellSouth's assertion here that it is barred under Section 4.5.1.5 from seeking audit costs from NewSouth if noncompliance is found as a result of the audit sharply contrasts with the position taken by BellSouth in its audit request – in which it invoked the *Supplemental Order Clarification* as authority for the audit and demanded NewSouth's payment of audit costs for noncompliance. *See generally* April 26, 2002 BellSouth Letter, Exh. B. As BellSouth implicitly concedes here, the demand for such audit costs demonstrates that BellSouth believed the Agreement to have incorporated the *Supplemental Order Clarification* requirements, which include an incumbent's right to reimbursement by a CLEC where noncompliance is found. *Supplemental Order Clarification* ¶ 31; *see infra* Legal Analysis.

40. To the extent Paragraph 40 contains statements of law, no response is required. NewSouth denies the allegations set forth in Paragraph 40, for the reasons set forth in this Answer. NewSouth specifically denies that it argues that the *Supplemental Order Clarification* "trumps" the Agreement and states that its contention is that the *Supplemental Order Clarification* is incorporated by the Agreement pursuant to the explicit terms of the Agreement and by the operation of Georgia law. *See infra* Legal Analysis.

41. To the extent Paragraph 41 contains statements of law, no response is required. NewSouth, however, specifically denies BellSouth's contention that NewSouth's position that the Agreement must interpreted consistent with existing law "is inconsistent . . . .with every

authority on the issue" and notes that controlling authority in this circuit clearly supports NewSouth's position. *See BellSouth Decision* at 465-66. NewSouth denies the allegations set forth in Paragraph 41, for the reasons set forth in this Answer. *See infra* Legal Analysis.

42. NewSouth denies the allegations set forth in Paragraph 42 for the reasons set forth in this Answer. *See infra* Legal Analysis; *see also* NewSouth Answer ¶ 45; Jennings Affidavit, Exh. A ¶¶ 5, 7-13.

43. To the extent Paragraph 43 contains statements of law, no response is required. NewSouth denies the allegations set forth in Paragraph 43, for the reasons set forth in the Legal Analysis provided below. NewSouth admits that, contrary to BellSouth's allegation, the FCC's *Supplemental Order Clarification* requires BellSouth to state a specific, *bona fide* and legitimately related concern that NewSouth has not complied with the certified safe harbor criteria. Moreover, the FCC recently underscored the continuing importance of the *Supplemental Order Clarification*'s audit protections in the *Triennial Review Order*, reaffirming that ILEC audit rights be limited to those circumstances where the incumbent has "cause" to doubt compliance with the eligibility criteria. *Triennial Review Order* ¶ 622. The *Triennial Review Order* further recognized that ILECs' audit rights must be "limited" so as to mitigate the risk of "illegitimate audits that impose costs" on carriers. *See Triennial Review Order* ¶¶ 614, 622, 626. The findings in the *Triennial Review Order* lay to rest any argument that the *Supplemental Order Clarification* really did not require a concern. *See infra* Legal Analysis.

44. To the extent Paragraph 44 contains statements of law, no response is required. NewSouth denies the allegations set forth in Paragraph 44, for the reasons set forth in the Legal Analysis provided below. NewSouth admits that, contrary to BellSouth's allegation, the FCC's *Supplemental Order Clarification* requires BellSouth to state a specific, *bona fide* and

legitimately related concern that NewSouth has not complied with the certified safe harbor criteria. Moreover, the FCC recently underscored the continuing importance of the *Supplemental Order Clarification*'s audit protections in the *Triennial Review Order*, reaffirming that ILEC audit rights be limited to those circumstances where the incumbent has "cause" to doubt compliance with the eligibility criteria. *Triennial Review Order* ¶ 622. The *Triennial Review Order* further recognized that ILECs' audit rights must be "limited" so as to mitigate the risk of "illegitimate audits that impose costs" on carriers. *Triennial Review Order* ¶¶ 614, 622, 626. Moreover, NewSouth notes that BellSouth's position that the *Supplemental Order Clarification* does not impose a requirement on an incumbent to have a concern prior to initiating an audit has been squarely rejected in proceedings before both the North Carolina and Georgia commissions. *See NuVox Decision* at 7-9, *Georgia Public Staff Memorandum* at 4-5; *North Carolina Public Staff Comments* at 2-3. Moreover, BellSouth must demonstrate that concern because, as the Public Staff of the Georgia Public Utilities Commission concluded, to determine that BellSouth is required by the *Supplemental Order Clarification* to have a concern (as the Public Staff did) but is not required to *demonstrate* such concern would "render the FCC's requirement meaningless." *See Georgia Public Staff Memorandum* at 4.

45. NewSouth denies the allegations set forth in Paragraph 45. BellSouth has acted in direct defiance of the FCC's ruling in the *Supplemental Order Clarification* that audits not be "routine" by issuing audit requests to at least a dozen carriers at the same time. *See* June 20, 2002 *Ex Parte*, Exh. C; June 24, 2002 *Ex Parte*, Exh. D; *Supplemental Order Clarification* ¶ 31, n.86. Moreover, BellSouth's belatedly asserted "concerns" – raised only after NewSouth challenged BellSouth's cause for the audit, as set forth in this Answer, establish no basis for BellSouth to have reasonably suspected NewSouth noncompliance with the applicable local

usage requirement as required by the *Supplemental Order Clarification*. *See*, *e.g.,* Jennings Aff. ¶¶ 5, 7-13, Exh. L; *Supplemental Order Clarification* ¶¶ 29, 31 n.81. With respect to BellSouth's first purported "concern" regarding NewSouth's purported inability to properly jurisdictionalize traffic, BellSouth fails to provide any information regarding when the alleged misreporting is supposed to have occurred or what traffic was involved. *See* Jennings Aff. ¶¶ 8-9, Exh. L. Indeed, it fails even to *allege* that this purported inability to jurisdictionalize traffic is related in any way to traffic carried over EELs circuits. *See* Jennings Aff. ¶ 8, Exh. L. BellSouth's failure to provide such basic information renders any consideration by the Commission of the reasonableness of BellSouth's purported concern impossible and hinders NewSouth's ability to mount any defense. Moreover, NewSouth is unaware of any instance in which BellSouth has a raised a question about NewSouth's jurisdictional reporting. Jennings Aff. ¶¶ 8-9, Exh. L. With respect to BellSouth's contention that various unidentified traffic studies indicate that the traffic that NewSouth passes to BellSouth is "largely nonlocal," BellSouth has again failed to provide the information necessary to demonstrate that such studies have any relevance to the circuits at issue in this proceeding. Jennings Aff. ¶ 10, Exh. L. As with BellSouth's jurisdictional misreporting allegation, BellSouth cannot rely on evidence that it has failed to introduce into the record on a request for summary disposition. Indeed, BellSouth has not only failed to attach the relevant traffic studies themselves to its Complaint but it has failed to provide *any* detail as to the circuits to which these studies purportedly apply, the timeframe which the studies supposedly covered, or the methodology used to conduct the studies. Jennings Aff. ¶ 10, Exh. L. The Commission thus has no basis on which to determine whether BellSouth's allegations have any relevancy whatsoever to the question of whether BellSouth satisfied the *Supplemental Order Clarification*'s "concern" requirement. Moreover,

even if BellSouth's traffic study allegations had been attached and provided the information asserted, the results of those studies would actually demonstrate that NewSouth was in compliance with the local usage requirement of ten percent for the Option under which NewSouth's circuits were self-certified. *See* Jennings Aff. ¶¶ 11-12, Exh. L.; *Supplemental Order Clarification* ¶ 22. NewSouth specifically denies that BellSouth's alleged traffic studies demonstrate a "traffic mix substantially different" from that to which NewSouth self-certified. NewSouth's circuits were converted under Option 2 which requires ten percent local usage. Jennings Aff. ¶¶ 11-12, Exh. L. The alleged traffic studies demonstrate local usage of 38 percent to 75 percent and therefore establish only that NewSouth far exceeded the applicable local usage threshold. *See* Hendrix Aff. ¶ 12, BellSouth Complaint, Exh. E; Jennings Aff. ¶¶ 11-12, Exh. L. NewSouth thus strongly denies that BellSouth has ever demonstrated that it had any reasonable concern that would justify an audit under the *Supplemental Order Clarification*.

46. NewSouth denies the allegations set forth in Paragraph 46. NewSouth specifically denies that BellSouth has demonstrated that its handpicked firm, ACA, is an independent third party auditor. BellSouth has never addressed NewSouth's concern, expressed repeatedly prior to the initiation of this proceeding, that ACA cannot be considered an independent auditor – as necessary for BellSouth's audit to proceed under the *Supplemental Order Clarification* – because of ACA's apparent financial dependence on ILEC business and its resulting incentive to ensure "good" audit results for its clients. *See, e.g.,* May 23, 2002 NewSouth Letter at 1-2, Exh. F (citing concerns regarding ACA's independence as set forth in the *NuVox Petition*); June 29, 2002 NewSouth Letter at 1, Exh. I ("If BellSouth were willing to replace its selected auditor with one without such predominant ILEC affiliations, NewSouth . . . would gladly consider the qualifications of a new auditor that does not have such obvious conflicts of interest."); August 7,

2002 NewSouth Letter at 3, Exh. K ("BellSouth has no legitimate basis for asserting that ACA – an ILEC consulting shop comprised of principles who have had prior careers with ILECs and now rely on a nearly all ILEC client base and who pitch their ability to generate revenues for ILECs via audits – is independent"). Moreover, as NewSouth informed BellSouth prior to the initiation of this Complaint, "ACA does not meet the AICPA standards and cannot reasonably be deemed 'independent.'" August 7, 2002 NewSouth Letter at 3, Exh. K; *see Triennial Review Order* ¶ 626 (providing that an incumbent LEC's selected auditor "must perform its evaluation in accordance with the standards established by the [AICPA]").

CAUSES OF ACTION

Count I

47. NewSouth incorporates by reference its responses to Paragraphs 1-46 as if fully set forth herein.

48. NewSouth denies the allegations set forth in Paragraph 48 for the reasons set forth in this Answer.

49. NewSouth denies the allegations set forth in Paragraph 49 for the reasons set forth in this Answer.

Count II

50. NewSouth incorporates by reference its responses to Paragraphs 1-49 as if fully set forth herein.

51. NewSouth denies the allegations in Paragraph 51 for the reasons set forth in this Answer.

52. NewSouth denies the allegations in Paragraph 52 for the reasons set forth in this Answer.

PRAYER FOR RELIEF

53. To the extent Paragraph 53 contains a prayer for relief, no response is required. Nevertheless, NewSouth requests that the Commission enter an order denying the relief requested in the Complaint as discussed below.

54. To the extent Paragraph 54 contains a prayer for relief, no response is required. Nevertheless, NewSouth denies that BellSouth is entitled to the relief sought in Paragraph 54 of the Complaint for the reasons set forth in this Answer and requests that the Commission find that NewSouth has not breached the terms of the Agreement.

55. To the extent Paragraph 55 contains a prayer for relief, no response is required. Nevertheless, NewSouth denies that BellSouth is entitled to the relief sought in Paragraph 55 of the Complaint for the reasons set forth in this Answer and requests that the Commission find that NewSouth has not violated the terms of the *Supplemental Order Clarification* and Section 251 of the Act.

56. To the extent Paragraph 56 contains a prayer for relief, no response is required. Nevertheless, NewSouth denies that BellSouth is entitled to the relief sought in Paragraph 55 for the reasons set forth in this Answer.

57. To the extent Paragraph 57 contains a prayer for relief, no response is required. Nevertheless, NewSouth denies any relief is just and proper for BellSouth and requests that the Commission enter an Order denying BellSouth's Complaint in its entirety.

58. Any allegation not previously responded to is hereby denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE
(Unclean Hands)

1. BellSouth's repeated refusals to provide justification for its audit request are in violation of FCC orders, and bar BellSouth's claims in this case. BellSouth has failed, after repeated requests by NewSouth, to put forth a sufficient "concern" with respect to its audit request, and to show how its audit request would satisfy any such "concern." *See*, *e.g.*, Exhibits F, I, and K. BellSouth has also acted in direct defiance of the FCC's ruling in the *Supplemental Order Clarification* that audits not be "routine" by issuing audit requests to at least a dozen carriers at the same time. *See*, *e.g.*, Exhibits C and D; *Supplemental Order Clarification* ¶ 31, n.86.

2. BellSouth has steadfastly refused to conduct its audit with persons that are independent third party auditors, as ordered in the *Supplemental Order Clarification*. *See Supplemental Order Clarification* ¶ 31 ("incumbent LECs requesting an audit should hire and pay for an independent auditor to perform the audit"); *see, e.g.*, Exhibits F, I, and K. NewSouth has raised legitimate concerns about ACA, the company that BellSouth selected to perform the audit. *See*, *e.g.*, Exhibits F, I , and K; NewSouth Answer ¶ 46. BellSouth, however, has refused to respond to these concerns and has steadfastly refused to conduct its audit with AICPA-certified auditors, *see Triennial Review Order* ¶ 626, instead insisting on using ACA.

3. The Parties' rights and obligations under the Agreement are governed by the laws of the State of Georgia. *See* Agreement, General Terms and Conditions, ¶ 18, Exh. A. Under Georgia law, "unclean hands" bars a complainant from obtaining relief if the litigant has engaged in misconduct "relat[ing] to the subject matter of the transaction concerning which relief is sought." *Rose v. Cain,* 247 Ga. App. 481, 485, 544 S.E.2d 453, 457 (2000); *see also Fuller v.*

Fuller, 211 Ga. 201, 202, 84 S.E.2d 665, 666 GA. CODE ANN. § 23-1-10 (2003) (1954); O.C.G.A. § 23-1-10 (2003) ("[h]e who would have equity must do equity and must give effect to all equitable rights of the other party respecting the subject matter of the action"). The law embodies the concept that "one will not be permitted to take advantage of his own wrong." *Dobbs v. Dobbs*, 270 Ga. 887, 888, 515 S.E.2d 384, 385 (1999) (internal citations omitted).

4. BellSouth's conduct falls within the parameters of the unclean hands doctrine. BellSouth's actions are in violation of the orders of the FCC's *Supplemental Order Clarification*. BellSouth has refused to cooperate and supply any reasonable basis for performing its audits on NewSouth, even though NewSouth has made that request on multiple occasions. *See*, *e.g.*, Exhibits F, I, and K. Although audits are not to be routine, *see*, *e.g.*, *Supplemental Order Clarification* ¶ 31, n.86, BellSouth sent out a form letter notifying more than a dozen carriers, including NewSouth, of BellSouth's intent to audit EELs, without providing any basis for the audit whatsoever. *See*, *e.g.*, Exhibits C and D. BellSouth has failed to identify any information to support a concern that NewSouth's EELs were not in compliance with the qualifying criteria set forth in the FCC's Order. *See*, *e.g.*, Jennings Affidavit ¶¶ 7-13, Exh. L. Moreover, BellSouth has not complied with the directives to select auditors that would meet the professional guidelines set forth in the FCC's orders. *See, e.g.*, NewSouth Answer¶ 46; Exhibits F, I, and K.

5. BellSouth is fully aware of the *Supplemental Order Clarification* and its directives, and has deliberately acted in contradiction of the FCC's requirements. Upon information and belief, BellSouth is only filing this Complaint in retaliation for a complaint filed by NewSouth at the FCC alleging that BellSouth failed to timely convert special access circuits to UNEs following submission of valid requests. Under the laws of Georgia, BellSouth cannot

pursue its Complaint against NewSouth based on its repeated and substantial violations of the *Supplemental Order Clarification*.

SECOND AFFIRMATIVE DEFENSE
(Breach of Contract)

6. NewSouth incorporates by reference its allegations in Paragraphs 1-5 of its Affirmative Defenses as if fully set forth herein.

7. Upon information and belief, it was BellSouth that materially breached the Agreement. Thus, Bellsouth is precluded from any recovery against NewSouth.

THIRD AFFIRMATIVE DEFENSE
(Waiver)

8. NewSouth incorporates by reference its allegations in Paragraphs 1-7 of its Affirmative Defenses as if fully set forth herein.

9. Upon information and belief, BellSouth is prohibited from recovering against NewSouth by the doctrine of waiver because BellSouth's own actions prevent it from making claims against NewSouth.

FOURTH AFFIRMATIVE DEFENSE
(Estoppel)

10. NewSouth incorporates by reference its allegations in Paragraphs 1-9 of its Affirmative Defenses as if fully set forth herein.

11. BellSouth, by its failure to follow the terms and provisions of the Agreement is estopped from seeking its requested relief.

LEGAL ANALYSIS IN OPPOSITION TO COMPLAINT AND REQUEST FOR SUMMARY DISPOSITION

I. TO OBTAIN SUMMARY DISPOSITION, BELLSOUTH MUST ESTABLISH AS A *MATTER OF LAW* EITHER THAT IT HAD AN UNQUALIFIED RIGHT TO AUDIT OR THAT IT COMPLIED WITH THE AUDIT REQUIREMENTS OF THE *SUPPLEMENTAL ORDER CLARIFICATION*

BellSouth seeks summary disposition of its claim. Such relief is "a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Marolyn L. Baril v. Aiken Regional Medical Centers*, 352 S.C. 271, 280, 573 S.E.2d 830, 835 (2002) (internal citations omitted). Summary judgment thus may only be granted when, viewing the evidence and drawing all reasonable inferences in favor of the nonmoving party, the Commission concludes that the moving party has conclusively demonstrated that no genuine issue exists as to any material fact and that it is entitled to judgment as a matter of law. *See id.* (internal citations omitted).

While the movant may rely on affidavits based on personal knowledge, it must attach sworn or certified copies of reports or documents referred to in such affidavits. Rule 56(e), SCRCP. Moreover, all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. *Baril*, 352 S.C. at 280, 573 S.E.2d at 835 (internal citations omitted). Indeed, "[E]ven when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.* Furthermore, summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Standard Fire Ins. Co. v. Marine Contracting and Towing Co.*, 301 S.C. 418, 301 S.E.2d 460, 422 (1990). For a summary judgment motion to be granted, it must be "perfectly clear that no issue of fact is involved." *See Davenport v. Island Ford, Lincoln, Mercury, Inc.*, 320 S.C. 424, 426, 465 S.E.2d 737, 739 (1995).

Thus, in order for BellSouth to succeed in its motion for summary judgment, it must demonstrate as a matter of law – viewing all evidence and drawing all inferences in favor of NewSouth – either that it had an unqualified right to audit or that it complied with the audit requirements imposed by the *Supplemental Order Clarification*. As demonstrated below, the express language of the Agreement (incorporating FCC UNE requirements), applicable contract law, and the conduct of BellSouth itself (relying on the *Supplemental Order Clarification* as authority for its audit request) make clear that BellSouth does not have an unqualified right to audit and that it is indeed subject to the *Supplemental Order Clarification* audit restrictions. In addition, as demonstrated by NewSouth below, BellSouth has failed to establish that its audit was not routine, that it had *any* reasonable basis for audit, or that its chosen auditor constituted an "independent auditor" as required by the *Supplemental Order Clarification*.

II. THE AGREEMENT INCORPORATES THE *SUPPLEMENTAL ORDER CLARIFICATION* AUDIT REQUIREMENTS

BellSouth's limited audit rights are governed by the criteria set forth in the FCC's *Supplemental Order Clarification*. BellSouth contracted in the Agreement to follow the requirements of the FCC's rules and orders, including the *Supplemental Order Clarification*,[15/] and contrary to BellSouth's claims, there is nothing in the Agreement, federal law, or in Georgia law that permits any other conclusion.

While BellSouth's audit request fails the criteria set forth in the *Supplemental Order Clarification, see infra,* Legal Analysis, Part III, BellSouth claims that the criteria is irrelevant because NewSouth allegedly gave up the audit protections in the *Supplemental Order Clarification*, and agreed to give BellSouth an unfettered right to conduct audits. BellSouth's proffered legal predicate for this claim is that the Parties entered into a voluntary interconnection

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15/ *See* Agreement, Att. 2, § 1.5, Exh. A.

agreement pursuant to Section 252 of the 1996 Act. *See*, *e.g.*, BellSouth Complaint ¶¶ 29-41. BellSouth states that Section 252(a)(1) permits parties to enter into voluntary agreements without regard to the standards of Section 251 or the Commission's implementing rules and orders. *See, e.g.,* BellSouth Complaint ¶ 34. In particular, BellSouth claims that the substantive obligations imposed under Section 251(b) and (c), as well as any implementing FCC rules and orders, including the *Supplemental Order Clarification*, necessarily fall away unless explicitly and specifically incorporated into each circumstance contemplated in the Agreement. *See, e.g.*, BellSouth Complaint ¶¶ 29-41. There is, however, no support for such an approach.

A. The Agreement Expressly Incorporates the FCC's UNE Rules, Including the *Supplemental Order Clarification*

Although Section 252(a)(1) permits parties to negotiate standards for the provisioning of UNEs other than those provided under Section 251(c)(3) of the Act, the Parties chose not to do so here. The Agreement by its terms expressly incorporates applicable law, including the requirements of *Supplemental Order Clarification.*

This is most plainly expressed in provisions of Attachment 2 of the Agreement, which contains the UNE provisions. Section 1.1 of Attachment 2 provides that it "sets forth the unbundled network elements and combinations of unbundled network elements that BellSouth agrees to offer to NewSouth *in accordance with its obligations under Section 251(c)(3) of the Act*." Agreement, Att. 2, § 1.1, Exh. A (emphasis added). Section 1.5 of Attachment 2 more specifically provides that "*[s]ubject to applicable and effective FCC Rules and Orders* as well as effective State Commission Orders, BellSouth will offer combinations of network elements *pursuant to such orders.*" Agreement, Att. 2, § 1.5, Exh. A (emphasis added). There is no dispute that one such applicable order is the *Supplemental Order Clarification*.

Similar language is found in Section 4 of Attachment 2, which addresses EELs generally. Section 4.2 of that Attachment states that "[w]here necessary to comply with an effective FCC and/or State Commission order, or as otherwise mutually agreed by the Parties, BellSouth shall offer access to loop and transport combinations, also known as the Enhanced Extended Link ("EEL")." Agreement, Att. 2, § 4.2., Exh. A.[16/] This language plainly reflects the Parties' intent to provide UNEs, and UNE combinations, such as EELs in particular, in conformance with effective and applicable FCC orders, such as the *Supplemental Order Clarification*.

Conveniently, BellSouth makes no mention of the above-referenced provisions of the Agreement in its Complaint. Instead, it focuses on language in Section 4.5.2.2 of the Agreement, which establishes the audit rights relating to a self-certification option established solely by contract. BellSouth argues that the provision's reference to the *Supplemental Order Clarification* means that the absence of an express reference to the *Order* in other provisions demonstrates that the *Order* was not meant to apply in those provisions. This argument is specious.

Section 4.5.2.2 of the Agreement specifies that NewSouth may request conversions subject to the three safe harbor options specified in the *Supplemental Order Clarification*, while Section 4.5.2 *et seq*. provides a fourth option for conversion that NewSouth could request if its opted to certify that at least 75 percent of the EELs was used to provide originating and

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[16/] The language in Attachment 2 echoes provisions found in the General Terms and Conditions section of the Parties' Agreement that further demonstrate the Parties' intent to comply and conform with the requirements of Section 251(c). For example, the Agreement's Preamble states that the Parties desire to "interconnect their facilities, purchase network elements and other services, and exchange traffic specifically for the purpose of fulfilling their obligations pursuant to sections 251 and 252 of the Telecommunications Act of 1996." Agreement, General Terms and Conditions, Preamble, Exh. A. Additionally, Section 1 of the Agreement states that "[t]he Parties agree that the rates, terms and conditions contained within this Agreement, including all Attachments, *comply and conform* with each Parties' obligations under Sections 251 and 252 of the Act." Agreement, General Terms and Conditions, § 1, Exh. A (emphasis added).

terminating local voice traffic. *See* Agreement, Att. 2, §§ 4.5.2.2, 4.5.2, *et seq*., Exh. A. Because the Option 4 circuits were entirely a product of the Agreement, and not the FCC's rules, the explicit reference to the *Supplemental Order Clarification* in Section 4.5.2.2 (as well as the reference in Section 4.5.5) was necessary to guarantee that the audit rights that automatically attached to the Options 1-3 circuits by virtue of the other provisions of the Agreement that incorporated the FCC's UNE requirements, including the *Supplemental Order Clarification* (*e.g.*, Agreement, Att. 2, §§ 1.1, 1.5, Exh. A), attached to the Option 4 conversion alternative as well.

Contrary to BellSouth's representations, this is the only reasonable interpretation of the Agreement's language. Claims instead that NewSouth voluntarily waived all of the protections against abusive audits set forth in the *Supplemental Order Clarification* by agreeing to give BellSouth unbounded discretion to conduct audits in any manner it wishes and using anyone it wants "at its sole expense, and upon thirty (30) days notice to NewSouth"[17/] are contrary to logic, fact, and law. Under BellSouth's interpretation of the Agreement, it would have an unqualified, unrestricted, and absolute right to audit NewSouth's EELs, subject only to the limitations that BellSouth, in its kindness, voluntary offers. For example, BellSouth's interpretation of the Agreement would give it unfettered discretion to use its own employees, set the scope and parameters associated with its audits without regard to any limiting standards, interpret and define the audit results according to any qualifying criteria (if any) that it opted to apply, and to set penalties for asserted "noncompliance" without regard to any law or reason. There is nothing to support BellSouth's patently illogical claim that the Agreement must be interpreted to mean that NewSouth intended to make BellSouth judge and jury over any audit of NewSouth's

17/ *See, e.g.,* BellSouth Complaint at 8-9 (*citing* Agreement, Att. 2, § 4.5.1.5, Exh. A).

converted EELs circuits, especially in light of the fact that the Agreement *expressly* incorporates FCC rules governing UNEs, including those restricting ILEC audit rights.

B. Contract Law Presumes Incorporation of Existing Law

Notwithstanding the fact that the terms and provisions of the Agreement expressly incorporate the FCC's UNE requirements, including those established by the *Supplemental Order Clarification*, BellSouth attempts to read an implicit waiver into the Agreement in contradiction of well-established contract law. As a general principle of contract law, agreements are interpreted in light of the body of law existing at the time the agreement was executed.[18/] Indeed, it is black letter law that parties intending to negotiate away legal rights must do so explicitly – and in the absence of such a specific exclusion, rights under the prevailing law are incorporated into the contract.[19/] Accordingly, the standards set forth by Section 251(c) of the Act and the Commission's rules and orders, including the *Supplemental Order Clarification*, would have governed the interpretation of the Parties' obligations even if the Parties had not specifically incorporated such language, as they in fact did.

This basic principle is also consistent with Georgia contract law, which governs the interpretation of the Agreement. *See* Agreement, General Terms and Conditions, § 18, Exh. A. Indeed, the Georgia Court of Appeals has held that "[t]he Parties will be presumed to contract

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18/ *See Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 499 (10th Cir. 2000) (concluding that a state commission was required to interpret a voluntary agreement "within the bounds of existing federal law."); *see also McKie v. McKie*, 100 S.E.2d 580, 583 (1957) ("The laws which exist at the time and place of the making of a contract, enter into and form a part of it and the parties must be presume to have contracted with reference to such laws and their effect on the subject matter…") (internal citations omitted); Williston on Contracts § 30:19 (4th ed. 2003) (incorporating existing applicable law into a contract does not require a deliberate expression of the Parties); *id.* ("valid applicable laws existing at the time of the making of a contract enter into and form a part of the contract as fully as if expressly incorporated in the contract.").

19/ Williston on Contracts § 30:19 (4th ed. 2003) (unless there is an express provision to the contrary, parties to a contract "are presumed or deemed to have contracted with reference to existing principles of law").

under the existing laws, and no intent will be implied to the contrary unless so provided by the terms of their agreement." *Jenkins v. Morgan*, 100 Ga. App. 561, 562, 112 S.E.2d 23, 24 (1959); *see also Crow v. Cook*, 215 Ga. App. 558, 564, 451 S.E.2d 467, 472 (1995). The *Jenkins* Court explained that the "[p]arties may stipulate for other legal principles to govern their contractual relationship than those prescribed by law, however, these must be expressly stated in the contract." 100 Ga. App. at 562.

Further, there is no distinction between the incorporation of state law and federal law. Just as the courts will incorporate the laws of Georgia, the courts will also incorporate Acts of Congress, "[w]here the subject matter of the contract between the Parties lies in an area covered by federal law, they necessarily adopt, as a portion of their agreement, the applicable provisions of the particular Act of Congress." Williston on Contracts § 30:20; *see also Federal Land Bank of Columbia v. Shingler*, 174 Ga. 352, 823 162 S.E. 815 (1932) ("where the subject-matter of a contract is exclusively one of national cognizance, and Congress has enacted a law for its complete regulation, the Parties must be presumed to have contracted with reference to the act of Congress and its effect on the subject–matter…").

Echoing *Jenkins*, the Georgia Supreme Court also has squarely held that "[p]arties to a contract are presumed to have contracted with reference to relevant laws and their effect on the subject matter of the contract, and a contract may not be construed to contravene a rule of law." *Van Dyck v. Van Dyck*, 263 Ga. 161, 163, 429 S.E.2d 914, 916 (1993) (*citing McKie,* 213 Ga. at 583, 100 S.E.2d at 583; *see also* O.C.G.A. § 13-2-3 (2003) (requiring courts to ascertain the intention of the Parties and to ensure that it contravenes no rule of law). Georgia law does not assume "that Parties intend to contract away their legal rights in regard to a subject matter not

clearly appearing therein." *Covington v. Brewer*, 101 Ga. App. 724, 729, 115 S.E.2d 368, 372 (1960).

Moreover, BellSouth's citation to Georgia contract cases that stand for the proposition that, where the terms of an agreement are clear and unambiguous, the courts will not imply any terms and will enforce the agreement as written are inapplicable. *See, e.g.,* BellSouth Complaint at 4, 15. NewSouth is entitled to the audit rights promulgated by the FCC in the *Supplemental Order Clarification* on the basis that the prevailing body of law is incorporated into the Agreement. The incorporation of legal terms into an agreement is legally distinct from incorporating "extraneous materials" into an agreement. BellSouth is clearly wrong in its assertion that the *Supplemental Order Clarification* must be viewed as extraneous material used to construe the contract in contradiction of its express terms. *See, e.g.*, BellSouth Complaint ¶¶ 29-41.

Indeed, a hearing officer of the Georgia Public Service Commission applying Georgia law held that an identical audit provision to the one at issue in this case incorporated the audit requirements of the *Supplemental Order Clarification.*[20/] BellSouth had argued before the Georgia Commission, just as it has here, that the audit provision of the interconnection

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[20/] *See NuVox Decision* at 7-9. In *NuVox*, BellSouth sued a company called NuVox for violating the interconnection agreement by refusing BellSouth's audit request. The audit provision in that contract provided that "BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox's] record[s] not more than on[c]e in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements." *NuVox Decision* at 7-8 (citing § 10.5.4, BellSouth/NuVox Agreement, Attachment 2). Except for the name of company, the clause is identical to the audit provision in the NewSouth/BellSouth Agreement. *See* Agreement, Att. 2, § 4.5.1.5, Exh. A. Although the hearing officer concluded in that case, after a hearing, that BellSouth had a concern sufficient to warrant an audit, the facts of the instant case are completely different.

agreement did not incorporate any of the *Supplemental Order Clarification's* audit requirements.[21/] The hearing officer rejected these arguments and found that:

> Under Georgia law, contracting parties are presumed to have incorporated the laws that existed when they entered into the contract, unless they explicitly excluded those obligations from the contract. There is nothing in the Agreement that carves-out the exemption BellSouth claims from the *Supplemental Order Clarification's* requirements regarding 'concern' and an independent auditor." Therefore, by operation of Georgia law, the *Supplemental Order Clarification* is incorporated into the Agreement …. In addition, we find that the parties did not exclude the requirements set forth in the *Supplemental Order Clarification* from the Agreement. Under Georgia law, the parties are presumed to have contracted with regard to existing law, unless the contract explicitly states to the contrary. *NuVox Decision* at 8.

Moreover, the hearing officer held that language in the general terms and conditions section of the agreement at issue in that case requiring the parties to comply with applicable law also incorporated the *Supplemental Order Clarification* into that agreement.[22/] In doing so, the hearing officer rejected the BellSouth argument – also made here – that under Georgia law, general language must give way to the more specific audit language of the audit provision.[23/]

If anything, language in the NewSouth interconnection agreement more clearly incorporates applicable law than the language in the NuVox interconnection agreement. As

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21/ *See NuVox Decision* at 2, 7-9.

22/ *NuVox Decision* at 8 (stating that "under the language of the Agreement, BellSouth is required to comply with all applicable law, including the *Supplemental Order Clarification*"). The NuVox Agreement provides:

> Each Party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, decisions, injunctions, judgments, awards and decrees that relate to its obligations under this Agreement. Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law, and nothing herein shall be deemed to prevent either Party from recovering its cost or otherwise billing the other party for compliance with the Order to the extent required or permitted by the term of such Order.

NuVox Decision at 8 (citing Section 35.1 of the General Terms and Conditions of the NuVox/BellSouth Agreement).

23/ *See NuVox Decision* at 8.

noted above, provisions in the Agreement here expressly require BellSouth to provide UNE combinations pursuant to applicable and effective FCC Orders. Indeed, North Carolina Public Staff Comments, in considering a BellSouth Complaint filed against NewSouth virtually identical this one, concluded – relying on the *NuVox Decision* – that the Parties' Agreement incorporates the requirements of the *Supplemental Order Clarification*.[24/] This Commission should do the same.

C. Contract Language That Plainly Tracks Controlling Law Is Presumed To Have Been Negotiated with Regard to Controlling Law

Nor does BellSouth's contention that parties that voluntarily negotiate an interconnection agreement may agree to provisions "without regard" to the requirements of Section 251(c)(3) and the implementing orders change the above result. *See, e.g.,* BellSouth Complaint at 2-4, 16-20, 24-26. Although this may be true as an abstract proposition, in this particular case, the Parties negotiated the EELs provisions, including the audit provisions, with regard to controlling law. This is because there is a "strong presumption" that negotiated provisions that plainly track controlling law were negotiated "with regard to the 1996 Act and controlling law." *BellSouth Decision* at 465.

Although BellSouth cites cases in the Second Circuit (*Trinko*)[25/] and New Jersey (*Ntegrity*)[26/] for the proposition that the provisions of voluntary interconnection agreements do not mirror the requirements of the Act or the FCC or State implementing rules, *see e.g.*, BellSouth Complaint at 2-3, 17-19, 25, BellSouth fails to cite or address controlling law in this circuit holding just the opposite and dictating the conclusion that the Agreement incorporates the

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24/ *North Carolina Public Staff Comments* at 2-3.

25/ *Law Offices of Curtis V. Trinko LLP v. Bell Atlantic Corp.*, 294 F.3d 307, 322 (2d Cir. 2002), *amended and superseded* 305 F.3d 89 (2d Cir. 2002), *rev'd sub nom. Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 124 S. Ct. 872 (2004) (reversed on other grounds).

26/ *Verizon New Jersey Inc. v. Ntegrity Telecontent Services Inc.,* 219 F. Supp.2d (D.N.J. 2002).

Supplemental Order Clarification requirements. The Fourth Circuit in the *BellSouth Decision*, directly addresses the issue of how to interpret voluntarily negotiated language in an interconnection agreement, concluding that such language that tracks applicable law must be interpreted consistent with that law.[27/] BellSouth's failure to cite the *BellSouth Decision* is remarkable not only because it is controlling law but also because BellSouth in that case was apparently advocating a position directly at odds with what it is advocating now. In the *BellSouth Decision*, BellSouth was advocating that voluntarily negotiated provisions in interconnection agreements must be read consistent with applicable law – and BellSouth's position prevailed.[28/]

The *BellSouth* Decision involved the interpretation of the AT&T/BellSouth interconnection agreement approved by the North Carolina Utilities Commission ("NCUC").[29/] The Agreement had both negotiated and arbitrated provisions. A voluntarily negotiated provision required BellSouth to combine UNEs.

After the agreement was approved by the NCUC, AT&T filed suit in the Eastern District of North Carolina.[30/] The court struck the negotiated provision requiring BellSouth to combine UNEs because, at the time, ILECs were not required under 251(c)(3) to combine UNEs.[31/] The court rejected arguments, ironically made there by AT&T and opposed by BellSouth, that carriers may voluntarily negotiate agreements without regard to the requirements of 251(c)(3).[32/]

27/ *BellSouth Decision* at 465-66.

28/ *BellSouth Decision* at 465-66.

29/ *BellSouth Decision* at 461.

30/ *BellSouth Decision* at 461-62.

31/ *BellSouth Decision* at 463-64.

32/ *BellSouth Decision* at 463-64.

On appeal to the Fourth Circuit, AT&T again argued that the voluntarily negotiated provision requiring BellSouth to combine UNEs must be reinstated because parties can negotiate around the requirements of the Act. The Fourth Circuit disagreed:

> AT&T is correct that the 1996 Act permits parties to negotiate – rather than arbitrate – provisions of their interconnection agreement; however, provisions not arbitrated are also *not necessarily* negotiated 'without regard to the standards set forth in subsections (b) and (c) of section 251.' That is, the 1996 Act requires both the ILEC and the CLECs to negotiate in good faith. When the Parties are so negotiating, many of their disputes will have been resolved by, among other things, FCC Rules and interpretations, prior state commission rulings and interpretations, and agreements reached with other CLECs – all of which are a matter of public record. In this light, many so-called 'negotiated' provisions represent nothing more than an attempt to comply with the requirements of the 1996 Act. . . . Where a provision plainly tracks the controlling law, there is a strong presumption that the provision was negotiated *with regard* to the 1996 Act and controlling law. *BellSouth Decision* at 465 (emphasis added) (citations omitted).

The Fourth Circuit thus concluded that the provision requiring Bellsouth to combine UNEs "although negotiated, may be reviewed by the district court for consistency with the 1996 Act and law thereunder." *BellSouth Decision* at 466.

The EELs conversion and related audit provisions of the Agreement here "plainly track" the *Supplemental Order Clarification*, and thus, under the *BellSouth Decision*, are presumed to have been negotiated with regard to the 1996 Act and controlling law, *i.e.*, the *Supplemental Order Clarification*. Section 4.5 of the UNE Attachment addresses EEL conversions. Agreement, Att. 2, § 4.5, Exh. A. It tracks the requirements of the *Supplemental Order Clarification.* First, it provides that NewSouth may not convert special access combinations unless it uses the combination to provide a "'significant amount of local exchange service.'" *Compare* Agreement, Att. 2, § 4.5.1, Exh. A with *Supplemental Order Clarification* ¶¶ 21-22. Next, it defines "'significant amount of local exchange service'" with reference to the

Supplemental Order Clarification and incorporates the *Supplemental Order Clarification's* safe harbors. *Compare* Agreement, Att. 2, § 4.5.1.2, Exh. A with *Supplemental Order Clarification* ¶ 22. It then tracks the *Supplemental Order Clarification's* finding that conversion should not require a physical disconnect and reconnect "because only the billing information or other administrative information associated with the circuit will change." *Compare* Agreement, Att. 2, § 4.5.1.4, Exh. A with *Supplemental Order Clarification* ¶ 30. Finally it provides for post-conversion audits on 30 days notice. *Compare* Agreement, Att. 2, § 4.5.1.5, Exh. A with *Supplemental Order Clarification* ¶ 31. Thus, the presumption established in the *BellSouth Decision* that provisions that plainly track controlling law are presumed to follow such law applies in this case. There is nothing in the Agreement or in the record to overcome this strong presumption.

D. BellSouth Issued Its Audit Request Pursuant to and Consistent with the *Supplemental Order Clarification*, Not the Agreement, and So Informed the FCC

Not only does the Agreement incorporate the requirements of the *Supplemental Order Clarification*, for the reasons stated above, but BellSouth's audit request was issued pursuant to the *Supplemental Order Clarification*, not the Agreement. *See* April 26, 2002 BellSouth Letter at 2, Exh. B ("*Per the Supplemental Order*, BellSouth is providing at least 30 days written notice…."). BellSouth cited the *Supplemental Order Clarification* as authority for requesting the audit, not the Parties' Agreement. Specifically, BellSouth's audit request states: "In the *Supplemental Order Clarification*, Docket No. 96-98 adopted May 19, 2000 and released June 2, 2000 ("Supplemental Order"), the FCC stated '[. . .] we allow incumbent LECs to subsequently conduct limited audits by an independent third party to verify the carrier's compliance with the significant local usage requirements.'" April 26, 2002 BellSouth Letter at 1, Exh. B.

BellSouth's audit letter thus pointed to the *Supplemental Order Clarification* as authority to conduct the requested audit.

Additionally, the audit letter repeatedly cites the *Supplemental Order Clarification* requirements. The audit request letter stated that "[c]onsistent with the FCC *Supplemental Order Clarification*, . . . BellSouth has selected an independent third party . . . to conduct an audit." *See* April 26, 2002 BellSouth Letter at 1, Exh. B. As part of its audit demand, BellSouth also required, "[i]n accordance with the Supplemental Order, NewSouth is required to reimburse BellSouth for the audit if the audit uncovers noncompliance." *See* April 26, 2002 BellSouth Letter at 2, Exh. B. The letter concluded by stating that, as required by the *Supplemental Order Clarification*, a copy of the letter was being sent to the FCC so that it could "monitor implementation" of the *Supplemental Order Clarification.* *See* April 26, 2002 BellSouth Letter at 2, Exh. B; See also *Supplemental Order Clarification* ¶ 31 (imposing notification requirement). Thus, BellSouth clearly recognized that the *Supplemental Order Clarification* governed its audit request.

Moreover, BellSouth's audit request demanded that NewSouth agree to requirements that are contained in the *Supplemental Order Clarification*, but, under BellSouth's theory of the case, are nowhere to be found in the Agreement. The prime example is BellSouth's demand that NewSouth reimburse BellSouth for the cost of the audit if circuits fail the audit. BellSouth's Complaint claims that this requirement is not included in the Agreement and that the requirement is only found in the *Supplemental Order Clarification.* BellSouth Complaint ¶ 39. Yet, BellSouth's audit request, the rejection of which forms the basis of its breach of contract claim, demanded that NewSouth reimburse BellSouth's audit costs upon a finding of noncompliance. April 26, 2002 BellSouth Letter at 2, Exh. B ("In accordance with the Supplemental Order,

NewSouth is required to reimburse BellSouth for the audit if the audit uncovers non-compliance with the local usage option . . . .").

Another example is BellSouth's demand in the audit request letter that "NewSouth is required to maintain appropriate records to support local usage and self-certification." April 26, 2002 BellSouth Letter at 1-2, Exh. B. The Agreement contains no express requirement that NewSouth *maintain* records, but such a requirement is set forth in the *Supplemental Order Clarification*, subject to caveat that smaller carriers like NewSouth must only maintain records kept in the normal course of business. *See Supplemental Order Clarification* ¶ 32 ("We expect that requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification."). Under BellSouth's theory, this *Supplemental Order Clarification* requirement cannot be read into agreement, yet BellSouth seeks to impose it on NewSouth.

BellSouth cannot have it both ways. It cannot on the one hand claim exemption from the *Supplemental Order Clarification* audit requirements of having to show a concern because of the language of the Agreement, while on the other hand imposing on NewSouth requirements found only in the *Supplemental Order Clarification* and not, under Bellsouth's theory, in the Agreement. And it patently cannot be the case that NewSouth breached the Agreement by refusing to comply with an audit request that contains requirements that BellSouth contends are not in the Agreement.

III. BELLSOUTH HAS NOT SATISFIED THE *SUPPLEMENTAL ORDER CLARIFICATION*'S REQUIREMENTS

A. BellSouth Has Not Demonstrated That Its Audit Was Not Routine or That It Had A Reasonable Concern

BellSouth's pleadings do not demonstrate, and certainly do not demonstrate as a matter of law, that it sought an audit of NewSouth's circuits because it had concerns that an audit was "*reasonably necessary* to determine a requesting carrier's compliance with the local usage

options"[33/] rather than because it wished to impose the costs of a routine audits on CLECs exercising their rights to EELs. Although providing no basis for concern in its initial audit request to NewSouth (which was merely one of thirteen CLECs targeted for audit), BellSouth now proffers two grounds for its alleged "concern" with respect to NewSouth's compliance with the local usage requirements. First, it contends that certain unidentified traffic studies "show that the traffic NewSouth passes to BellSouth in several states is largely non-local." BellSouth Complaint ¶ 45. Second, BellSouth contends that it "has previously had issues with NewSouth regarding NewSouth's inability to appropriately jurisdictionalize traffic it sends to BellSouth."[34/] Neither of these bases provides any support for the conclusion that BellSouth had any reasonable basis to doubt NewSouth's compliance with the eligibility requirements or dispels in any way the conclusion that BellSouth instead sought routine audits in violation of the *Supplemental Order Clarification*.

1. The Evidence Indicates That BellSouth Conducted a Routine Audit.

As noted above, the *Supplemental Order Clarification*'s prohibition against routine audits[35/] and its companion requirement that auditing carriers have a concern that the audit is reasonably necessary to ensure compliance with the eligibility criteria,[36/] are grounded in important public policy considerations. These limitations, like numerous other protections set

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33/ *Supplemental Order Clarification* ¶ 29; *see also Supplemental Order Clarification* n.86 "[A]udits will *not be routine* practice, but will *only* be undertaken when the incumbent LEC has a *concern* that a requesting carrier has not met the criteria for providing a significant amount of local exchange service.") (emphasis added).

34/ BellSouth Complaint ¶ 45. June 6, 2002 BellSouth Letter, Exh. G (claiming that unqualified BellSouth "records indicate that NewSouth has misreported its PIU/PLU factors in the past").

35/ *Supplemental Order Clarification* ¶ 31 n.86.

36/ *Supplemental Order Clarification* ¶ 29.

forth by the *Supplemental Order Clarification*,[37/] are intended to protect competitive carriers from the sort of abusive ILEC audit practices at issue here – the indiscriminate issuance of audit requests with the intent to impose unnecessary and burdensome costs on competitors. *See Supplemental Order Clarification* ¶¶ 29-32.[38/]

The facts indicate that BellSouth was seeking precisely the type of burdensome and anticompetitive routine audit barred by the FCC and was not, as it claims, conducting audits only where it had a legitimate concern. As BellSouth notified the FCC, NewSouth was only one of more than a dozen CLECs to whom BellSouth sent virtually simultaneous audit requests. *See* June 20, 2002 BellSouth *Ex Parte*, Exh. C. This shotgun approach requests at least raise an inference that BellSouth was noticing audits simply because carriers had obtained EELs, not because it had a legitimate concern of noncompliance with applicable eligibility criteria.

This inference is further supported by the fact that BellSouth believed, albeit wrongfully, that it a had an unqualified right to obtain these audits and did not need to have a concern. *See, e.g.*, June 6, 2002 BellSouth Letter at 1, Exh. G; BellSouth Complaint at 3, 22 ¶¶ 13, 31. In fact,

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37/ Among those protections are the following: the requirement that EELs be immediately converted upon ILEC receipt of self-certification, a 30-day written notice requirement, the ILEC obligation to pay for the costs of an audit unless noncompliance is found, and FCC notification of audits. *Supplemental Order Clarification*. ¶¶ 30-32.

38/ The FCC recently underscored the continuing importance of the *Supplemental Order Clarification*'s audit protections in the *Triennial Review Order*. First, recognizing that the *Supplemental Order Clarification*'s eligibility criteria were unworkable and subject to ILEC audit abuse, the FCC established new, more effective eligibility standards. *See Triennial Review Order* ¶¶ 596-597, 614. In addition, the FCC expressly reaffirmed the requirement that ILEC audit rights be limited to those circumstances where the incumbent has "cause" to doubt compliance with the eligibility criteria. *Triennial Review Order* ¶ 622. Specifically, the *Triennial Review Order* concluded that: "the basic principles of entitling requesting carriers unimpeded UNE access based upon self-certification, subject to later verification *based upon cause*, [sic] are equally applicable" to the new eligibility scheme. *Triennial Review Order* ¶ 622 (emphasis added). The *Triennial Review Order* further recognized that ILECs' audit rights must be "limited" so as to mitigate the risk of "illegitimate audits that impose costs" on carriers. *Triennial Review Order* ¶ 626. Moreover, the Georgia Public Service Staff recently recommended that the NuVox Hearing Officer's conclusion that BellSouth must demonstrate cause for an audit request be upheld, recognizing that to conclude otherwise would "render the FCC's requirement meaningless." *See Georgia Public Staff Memorandum* at 4.

only after NewSouth complained that BellSouth's audit request did not identify any concern[39/] – let alone a reasonable concern – and only after the FCC began to make inquiries of BellSouth's audit requests,[40/] did BellSouth belatedly conjure up purported concerns in order to avoid the conclusion that it was engaged in a prohibited routine audit. *See* June 6, 2002 BellSouth Letter at 1, Exh. G. Such conduct, at the very minimum, raises questions of fact regarding the crucial issue of whether BellSouth's intent was consistent with that permitted by the *Supplemental Order Clarification* or instead was an illegitimate attempt to disadvantage its competitors by imposing burdensome and costly audit obligations upon them. Such a conclusion is further strengthened by the fact that the "concerns" offered by BellSouth in support of its audit request provide no basis to believe that an audit was "reasonably necessary" to ensure NewSouth's compliance with the applicable eligibility requirements.

2. BellSouth's Traffic Studies Cannot and Do Not Demonstrate a Concern

BellSouth contends that it has traffic studies that indicate that: "[i]n South Carolina, 75% of all NewSouth's traffic is local; in Louisiana, only 66% of NewSouth's and 0% of Universal Communications' traffic is local; in North Carolina, just 45% is local; and in Tennessee, only 38% of all NewSouth's traffic is local." *See, e.g.*, Hendrix Affidavit ¶ 12, BellSouth Complaint, Exh. E. BellSouth argues that these studies demonstrate a concern because NewSouth allegedly certified that "the traffic mix on [the EEL] circuits is substantially different than the traffic studies would suggest." *See, e.g.,* BellSouth Complaint ¶ 45.

These allegations do nothing to establish BellSouth's claim that it had a concern justifying audit and, moreover, are procedurally and substantively insufficient to support a

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39/ *See* May 23, 2002 NewSouth Letter, Exh. F.

40/ *See NuVox Petition* (filed May 17, 2002); June 24, 2002 BellSouth *Ex Parte*, Exh. D (BellSouth *ex parte* in the *NuVox Petition* proceeding responding to allegations regarding its audit practices).

motion for summary disposition. First, they are entirely conclusory. They are based solely on allegations contained in an affidavit by a BellSouth employee. *See* Hendrix Affidavit ¶ 12, BellSouth Complaint, Exh. E. Under applicable rules, summary judgment based on affidavits must include the documents that form the basis of the allegation in the affidavit. Rule 56(e), SCRCP. BellSouth has failed to include the traffic studies it claims demonstrate a concern. Indeed, it fails even to attach the letter in which it initially made the above conclusory claims regarding the purported findings of the traffic studies. *See* July 17, 2002 BellSouth Letter, Exh. J.

In fact, BellSouth has failed to provide any information, either in prosecution of its Complaint or to NewSouth prior to these proceedings, concerning when these studies took place, what was studied and how, or even that the traffic related to converted EELs. *See* Jennings Aff. ¶ 10, Exh. L. Moreover, BellSouth does not indicate how it measured local traffic in those studies. *See* Jennings Aff. ¶ 10, Exh. L. For purposes of NewSouth's compliance with the EELs eligibility requirement of significant local usage, "local" is defined as calls that originate and terminate in the LATA. Jennings Aff. ¶ 10, Exh. L. This is because the *Supplemental Order Clarification* defines local with reference to how that term is defined in the parties' interconnection agreement.[41/] In this case, the Parties' Agreement defines local as intraLATA calls.[42/] There is no indication that BellSouth's traffic studies alleging traffic to be "largely non-

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41/ *Supplemental Order Clarification*, at n.64 ("Traffic is local if it is defined as such in a requesting carrier's state-approved local exchange tariff and/or it is subject to a reciprocal compensation agreement between the requesting carrier and incumbent LEC.").

42/ *See* Jennings Aff. ¶ 10, Exh. L; Jennings Aff., Section 5.1.1, Attachment 3, Agreement ("For reciprocal compensation between the Parties pursuant to this Attachment, Local Traffic is defined as any telephone call that is originated by an end user of one Party and terminated to an end user of the other Party within a given LATA on that other Party's network, except for those calls that are originated or terminated through switched access arrangements."), *found at* http://cpr.bellsouth.com/clec/docs/all_states/80058b9a.pdf.

local" measured local calls as intraLATA calls. Jennings Aff. ¶ 10, Exh. L. BellSouth's failure to provide this information not only fatally undermines its motion for summary disposition, Rule 56(e), but also is fundamentally unfair to NewSouth, which is left to guess as to the basis of BellSouth's allegations.

However, even if those reports have some validity (something that neither NewSouth nor the Commission can determine), the findings of those studies as described by BellSouth provide no basis to suspect NewSouth noncompliance with the applicable local usage option. To the contrary, they, in fact, demonstrate NewSouth's compliance. The eligibility criteria applicable to all the circuits at issue in this proceeding require only that at least ten percent of the traffic over the circuits be local. Jennings Aff. ¶ 11, Exh. L; *Supplemental Order Clarification* ¶ 22. This is because all of the circuits at issue were converted pursuant to Option 2 of the *Supplemental Order Clarification*.[43/] Jennings Aff. ¶ 11, Exh. L.

For DS1 circuits, which is the type of circuit NewSouth orders from BellSouth, Option 2 requires that "at least 50 percent of the activated channels on the loop portion of the loop-transport combination have at least 5 percent local voice traffic individually, and the entire loop facility has at least 10 percent local voice traffic." *Supplemental Order Clarification* ¶ 22 (footnote references omitted); Jennings Aff. ¶ 11, Exh. L. As a practical matter, for the channelized DS1 circuits utilized by NewSouth, this means that compliance with the Option 2 criteria only requires that ten percent of the traffic over the DS1 loop be local. Jennings Aff. ¶

43/ BellSouth's Complaint does not identify which option NewSouth utilized. There is some suggestion in BellSouth correspondence that the reason it believed that its traffic studies were relevant is that NewSouth ordered EELs under so-called Option 4 of the interconnection agreement, which requires 75 percent local usage. BellSouth's Complaint, however, nowhere even alleges that NewSouth ordered any EELs under Option 4 – let alone puts in any evidence on the matter. To the extent that the validity of BellSouth's concern hinges on whether there are Option 4 circuits, a material issue of fact clearly exists as NewSouth strongly disputes that any circuits were converted under Option 4. Jennings Aff. ¶ 11, Exh. L. (*all* of the circuits were converted under Option 2). *See, e.g.* NewSouth Answer ¶¶ 9-11, 21.

11, Exh. L. BellSouth, making only the vague, irrelevant, and inaccurate allegation that NewSouth traffic was "largely non-local", *see, e.g.,* BellSouth Complaint ¶ 45, has never even alleged – much less demonstrated as a matter of law – that it has a concern that NewSouth's traffic failed to meet the applicable Option 2 standard against which NewSouth's compliance must be measured for audit purposes.

Indeed, the purported levels of local traffic cited by BellSouth show percentages of local traffic several orders of magnitude above that which is required by the applicable eligibility standard. *See* Jennings Aff. ¶ 12, Exh. L. In North Carolina, for example, BellSouth's traffic studies purport to show that 45 percent of NewSouth traffic is local, more than four times the ten percent local traffic requirement contained in the applicable eligibility criteria. *See, e.g.*, Hendrix Affidavit ¶ 12, BellSouth Complaint, Exh. E; Jennings Aff. ¶ 12, Exh. L. BellSouth's traffic studies are even higher in other states, for example, 75 percent in South Carolina and 66 percent in Louisiana. *See, e.g.*, Hendrix Affidavit ¶ 12, BellSouth Complaint, Exh. E; Jennings Aff. ¶ 12, Exh. L. The studies, even if accurate, actually show a substantial amount of local traffic, and are diametrically at odds with BellSouth's facially false assertion that these studies show that traffic "is largely non-local." *See, e.g.*, BellSouth Complaint ¶ 45; Jennings Aff. ¶ 12, Exh. L. At any rate "largely non-local" is not the applicable standard – ten percent local usage is the applicable standard. *See, e.g.*, *Supplemental Order Clarification* ¶ 22; NewSouth Answer ¶ 45; Jennings Aff. ¶ 12, Exh. L.

Thus, properly understood, it is clear that there is no substance to BellSouth's allegation that its traffic studies show traffic mixes that are substantially different from the traffic NewSouth is alleged to have certified would run over the EELs. In fact, since NewSouth certified under Option 2 of the *Supplemental Order Clarification*, its claim with respect to these

circuits is that at least ten percent of traffic would be local. BellSouth's alleged traffic studies merely confirm that NewSouth is in full compliance with the applicable eligibility standard.[44/]

3. BellSouth Has Provided No Competent Evidence of Any Jurisdictional Misreporting by NewSouth

With respect to BellSouth's contention that its audit request is justified because of purported problems with NewSouth's past jurisdictional reporting, *see, e.g.*, BellSouth Complaint ¶ 45, NewSouth is at the same impermissible disadvantage that it faces with respect to the absent traffic studies. BellSouth failed to include the reports on which its affiant based his claim of jurisdictional misreporting as required by Rule 56(e). *See* Hendrix Affidavit ¶ 12, BellSouth Complaint, Exh. E. As a result, NewSouth has no basis on which to respond and the Commission has no basis on which to accept or evaluate BellSouth's allegation of jurisdictional misreporting. *See* Jennings Aff. ¶ 8, Exh. L.

Indeed, NewSouth is unaware of any instance in which BellSouth has a raised a question about NewSouth reporting of PLU/PIU factors, as alleged by BellSouth in its July 6, 2002 Letter (which BellSouth has also failed to attach). Jennings Aff. ¶¶ 8-9, Exh. L. Indeed, the only instance in which any issue was ever raised, it was raised by NewSouth when it self-corrected its initial PLU/PIU report in the first quarter of 2002. Jennings Aff. ¶ 9, Exh. L. In that single instance, NewSouth was attempting to comply for the first time with BellSouth's complicated PLU/PIU formulas and guidance. Jennings Aff. ¶ 9, Exh. L. It turned out that NewSouth misunderstood certain aspects of the formula resulting in inadvertently *underreporting* the amount of local usage. Jennings Aff. ¶ 9, Exh. L. NewSouth filed new PLU factors the

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[44/] Only in one instance do BellSouth's alleged traffic studies purport to show less than ten percent local traffic. BellSouth claims that "0% of Universal Communications' traffic is local" in Louisiana. *See*, *e.g.,* Hendrix Aff. ¶ 12, BellSouth Complaint, Exh. E. BellSouth, however, fails to identify Universal Communications or explain why its traffic is at all relevant. Jennings Aff. ¶ 13, Exh. L.

following quarter and has continued to file every quarter since then without any concerns being raised by BellSouth. *See* Jennings Aff. ¶ 9, Exh. L. Thus, BellSouth has failed to demonstrate, and certainly has failed to do so as a matter of law, that BellSouth had any reasonable concern regarding jurisdictional misreporting by NewSouth

B. BellSouth Has Not Selected an Independent Auditor As Required By the *Supplemental Order Clarification*

The *Supplemental Order Clarification* also conditions an ILEC's audit rights on its use of an independent auditor. *See Supplemental Order Clarification* ¶ 31 ("incumbent LECs requesting an audit should hire and pay for an independent auditor to perform the audit."). The FCC reaffirmed the importance of this requirement in the *Triennial Review Order* where it explained that such an auditor "must perform its evaluation in accordance with the standards established by the [AICPA]." *See Triennial Review Order* ¶ 626. Despite its clear obligation under the *Supplemental Order Clarification* (and thus the Agreement) to ensure the independence of its auditor, upon which its audit right is dependent, BellSouth has failed to provide any substantive response to NewSouth's specific challenges to ACA's independence.

Both in its pre-Complaint correspondence with BellSouth and in its Answer to BellSouth, NewSouth detailed its concerns regarding both the independence of ACA and its qualifications as an auditor. NewSouth explained that ACA did not qualify as an "independent auditor" because of its status as an ILEC consulting shop and its failure to comply with AICPA standards.[45/] *See*, *e.g.,* May 23, 2002 NewSouth Letter at 2, Exh. F ("Based on new information recently discovered by NewSouth - much of it included in the Petition for Declaratory Rulemaking of NuVox, Inc., it is NewSouth's opinion that neither [of the *Supplemental Order*

45/ It should be noted that the Staff in the Georgia *NuVox* proceeding recommend that BellSouth be required to conduct the audit in accordance with AICPA standards and pay for any costs associated with adherence to those standards. Georgia Staff Memorandum at 1.

Clarification's] requirements has been met"); June 29, 2002 NewSouth Letter at 1, Exh. I ("If BellSouth were willing to replace its selected auditor with one without such predominant ILEC affiliations, NewSouth . . . would gladly consider the qualifications of a new auditor that does not have such obvious conflicts of interest."); August 7, 2002 NewSouth Letter at 3, Exh. K ("ACA does not meet the AICPA standards and cannot reasonably be deemed 'independent.'"). As NewSouth explained in its August 7, 2002 Letter, "BellSouth has no legitimate basis for asserting that ACA – an ILEC consulting shop comprised of principles who have had prior careers with ILECs and now rely on a nearly all ILEC client base and who pitch their ability to generate revenues for ILECs via audits – is independent." August 7, 2002 NewSouth Letter at 3, Exh. K.

Despite the fact that the burden is on BellSouth, as movant for summary disposition, to demonstrate that it has established the elements of its claim as a matter of law, the only evidence put into the record by BellSouth in this proceeding regarding the satisfaction of the independent auditor requirement is various bald assertions of ACA's independence and the following conclusory paragraph in the Hendrix affidavit:

> BellSouth selected American Consultants Alliance to audit NewSouth's EELs in accordance with the terms of the Agreement. The firm is not related to BellSouth nor affiliated with BellSouth in any way. Nor is the firm subject to the control or influence of BellSouth or dependent on BellSouth. Hendrix Affidavit¶ 5, BellSouth Complaint, Exh. E.

This vague response raises more questions than it answers. For instance, how does BellSouth know that ACA is not "dependent on BellSouth?" There is no reason to believe that Mr. Hendrix has any personal knowledge regarding the inner workings of ACA necessary to support any conclusion that ACA is not dependent on ILEC good will (and business) including that of BellSouth. Moreover, there is no information in the record about the amount of work

ACA obtains from BellSouth itself or what percentage of its revenues are obtained from ILECs generally. Nor is there any affidavit or statement of any kind from ACA itself attesting to the purported absence of BellSouth or ILEC control or that ACA is, in fact, not dependent on revenue from ILEC sources. There can be no question that BellSouth has thus failed to demonstrate, and certainly has failed to do so as a matter of law, that ACA constitutes an independent auditor as required by the *Supplemental Order Clarification*.

CONCLUSION

For all of the reasons set forth herein, NewSouth respectfully requests that the Commission deny the relief sought by BellSouth in its Complaint and Request for Summary Disposition, and grant such other relief as is just and proper.

Respectfully submitted this 7th day of April, 2004.

/S/

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STATE OF SOUTH CAROLINA)
) **VERIFICATION**
COUNTY OF GREENVILLE)

JAKE E. JENNINGS, being duly sworn, does hereby declare that I have reviewed the foregoing Answer of NewSouth to the Complaint and that it is true as to my personal knowledge except as to those items stated upon information and belief, which I believe to be true based upon the information provided to me.

This 7th day of April, 2004.

_____(SEAL)
JAKE E. JENNINGS

Subscribed and Sworn to before me
this 7th day of April, 2004.

_____
Notary Public

My Commission expires: _____

My Commission Expires July 8, 2008

List of Exhibits

Exhibit A	Interconnection Agreement (selected provisions)
Exhibit B	Letter from Jerry Hendrix to Jake Jennings on April 26, 2002
Exhibit C	Ex Parte Notices from Whit Jordan, BellSouth, to the FCC, CC Docket No. 96-98, June 20, 2002
Exhibit D	Ex Parte Notices from Whit Jordan, BellSouth, to the FCC, CC Docket No. 96-98, June 24, 2002
Exhibit E	Letter from Jake Jennings to Jerry Hendrix on May 3, 2002
Exhibit F	Letter from Jake Jennings to Jerry Hendrix on May 23, 2002
Exhibit G	Letter from Jerry Hendrix to Jake Jennings on June 6, 2002
Exhibit H	Letter from Jerry Hendrix to Jake Jennings on June 27, 2002
Exhibit I	Letter from Jake Jennings to Jerry Hendrix on June 29, 2002
Exhibit J	Letter from Jerry Hendrix to Jake Jennings on July 17, 2002
Exhibit K	Letter from Jake Jennings to Jerry Hendrix on August 7, 2002
Exhibit L	Affidavit of Jake Jennings on behalf of NewSouth Communications Corp.

EXHIBIT A

By and Between

BellSouth Telecommunications, Inc.

And

NewSouth Communications, Corp.

TABLE OF CONTENTS

AGREEMENT

THIS AGREEMENT is made by and between BellSouth Telecommunications, Inc., ("BellSouth"), a Georgia corporation, and NewSouth Communications, Corp., ("NewSouth") a Delaware corporation, and shall be deemed effective as of the date of the last signature of both Parties ("Effective Date"). This Agreement may refer to either BellSouth or NewSouth or both as a "Party" or "Parties."

W I T N E S S E T H

WHEREAS, BellSouth is an Incumbent Local Exchange Telecommunications Company (ILEC) authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee; and

WHEREAS, NewSouth is or seeks to become a Competitive Local Exchange Telecommunications Company ("CLEC") authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

WHEREAS, the Parties wish to resell BellSouth's telecommunications services and/or interconnect their facilities, purchase network elements and other services, and exchange traffic specifically for the purposes of fulfilling their obligations pursuant to sections 251 and 252 of the Telecommunications Act of 1996 ("the Act").

NOW THEREFORE, in consideration of the mutual agreements contained herein, BellSouth and NewSouth agree as follows:

1. Purpose

The Parties agree that the rates, terms and conditions contained within this Agreement, including all Attachments, comply and conform with each Parties' obligations under sections 251 and 252 of the Act. The resale, access and interconnection obligations contained herein enable NewSouth to provide competing telephone exchange service to residential and business subscribers within the territory of BellSouth. The Parties agree that NewSouth will not be considered to have offered telecommunications services to the public in any state within BellSouth's region until such time as it has ordered services for resale or interconnection facilities for the purposes of providing business and/or residential local exchange service to customers.

2. Term of the Agreement

2.1 The term of this Agreement shall be two years, beginning on the Effective Date and shall apply to the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. If as of the expiration of this Agreement, a Subsequent Agreement (as defined in Section 2.2 below) has not been executed by the Parties, this Agreement shall continue on a month-to-

month basis while a Subsequent Agreement is being negotiated. The Parties' rights and obligations with respect to this Agreement after expiration shall be as set forth in Section 2.4 below.

2.2 The Parties agree that by no later than one hundred and eighty (180) days prior to the expiration of this Agreement, they shall commence negotiations with regard to the terms, conditions and prices of resale and/or local interconnection to be effective beginning on the expiration date of this Agreement ("Subsequent Agreement").

2.3 If, within one hundred and thirty-five (135) days of commencing the negotiation referred to in Section 2.2 above, the Parties are unable to satisfactorily negotiate new resale and/or local interconnection terms, conditions and prices, either Party may petition the Commission to establish appropriate local interconnection and/or resale arrangements pursuant to 47 U.S.C. 252. The Parties agree that, in such event, they shall encourage the Commission to issue its order regarding the appropriate local interconnection and/or resale arrangements no later than the expiration date of this Agreement. The Parties further agree that in the event the Commission does not issue its order prior to the expiration date of this Agreement, or if the Parties continue beyond the expiration date of this Agreement to negotiate the local interconnection and/or resale arrangements without Commission intervention, the terms, conditions and prices ultimately ordered by the Commission, or negotiated by the Parties, will be effective retroactive to the day following the expiration date of this Agreement.

2.4 Notwithstanding the foregoing, in the event that as of the date of expiration of this Agreement and conversion of this Agreement to a month-to-month term, the Parties have not entered into a Subsequent Agreement and either no arbitration proceeding has been filed in accordance with Section 2.3 above, or the Parties have not mutually agreed (where permissible) to extend the arbitration window for petitioning the applicable Commission(s) for resolution of those terms upon which the Parties have not agreed, then either Party may terminate this Agreement upon sixty (60) days notice to the other Party. In the event that BellSouth terminates this Agreement as provided above, BellSouth shall continue to offer services to NewSouth pursuant to the terms, conditions and rates set forth in BellSouth's Statement of Generally Available Terms (SGAT) to the extent an SGAT has been approved by the applicable Commission(s). If any state Commission has not approved a BellSouth SGAT, then upon BellSouth's termination of this Agreement as provided herein, BellSouth will continue to provide services to NewSouth pursuant to BellSouth's then current standard interconnection agreement. In the event that the SGAT or BellSouth's standard interconnection agreement becomes effective as between the Parties, the Parties may continue to negotiate a Subsequent Agreement, and the terms of such Subsequent Agreement shall be effective retroactive to the day following expiration of this Agreement.

3. Ordering Procedures

3.1 NewSouth shall provide BellSouth its Carrier Identification Code (CIC), Operating Company Number (OCN), Group Access Code (GAC) and Access Customer Name and Address (ACNA) code as applicable prior to placing its first order.

3.2 The Parties agree to adhere to the BellSouth Local Interconnection and Facility Based Ordering Guide and Resale Ordering Guide, as appropriate for the services ordered.

3.3 NewSouth shall pay charges for Operational Support Systems (OSS) as set forth in this Agreement in Attachment 1 and/or in Attachment 2, 3, 5 and 7 as applicable.

4. Parity

When NewSouth purchases, pursuant to Attachment 1 of this Agreement, telecommunications services from BellSouth for the purposes of resale to end users, BellSouth shall provide said services so that the services are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that BellSouth provides to its affiliates, subsidiaries and end users. To the extent technically feasible, the quality of a Network Element, as well as the quality of the access to such Network Element provided by BellSouth to NewSouth shall be at least equal in quality to that which BellSouth provides to itself. The quality of the interconnection between the networks of BellSouth and the network of NewSouth shall be at a level that is equal to that which BellSouth provides itself, a subsidiary, an Affiliate, or any other party. The interconnection facilities shall be designed to meet the same technical criteria and service standards that are used within BellSouth's network and shall extend to a consideration of service quality as perceived by end users and service quality as perceived by NewSouth.

5. White Pages Listings

BellSouth shall provide NewSouth and their customers access to white pages directory listings under the following terms:

5.1 Listings. NewSouth shall provide all new, changed and deleted listings on a timely basis and BellSouth or its agent will include NewSouth residential and business customer listings in the appropriate White Pages (residential and business) or alphabetical directories. Directory listings will make no distinction between NewSouth and BellSouth subscribers.

5.2 Rates. BellSouth and NewSouth will provide to each other subscriber primary listing information in the White Pages for a non-recurring charge.

5.3 Procedures for Submitting NewSouth Subscriber Information are found in BellSouth's Ordering Guide for manually processed listings and in the Local Exchange Ordering Guide for mechanically submitted listings.

5.3.1 Notwithstanding any provision(s) to the contrary, NewSouth agrees to provide to BellSouth, and BellSouth agrees to accept, NewSouth's Subscriber Listing Information (SLI) relating to NewSouth's customers in the geographic area(s) covered by this Interconnection Agreement. NewSouth authorizes BellSouth to release all such NewSouth SLI provided to BellSouth by NewSouth to qualifying third parties via either license agreement or BellSouth's Directory Publishers Database Service (DPDS), General Subscriber Services Tariff, Section A38.2, as the same may be amended from time to time. Such CLEC SLI shall be intermingled with BellSouth's own customer listings of any other CLEC that has authorized a similar release of SLI. Where necessary, BellSouth will use good faith efforts to obtain state commission approval of any necessary modifications to Section A38.2 of its tariff to provide for release of third party directory listings, including modifications regarding listings to be released pursuant to such tariff and BellSouth's liability therunder. BellSouth's obligation pursuant to this Section shall not arise in any particular state until the commission of such state has approved modifications to such tariff.

5.3.2 No compensation shall be paid to NewSouth for BellSouth's receipt of NewSouth SLI, or for the subsequent release to third parties of such SLI. In addition, to the extent BellSouth incurs costs to modify its systems to enable the release of NewSouth's SLI, or costs on an ongoing basis to administer the release of NewSouth SLI, NewSouth shall pay to BellSouth its proportionate share of the reasonable costs associated therewith.

5.3.3 BellSouth shall not be liable for the content or accuracy of any SLI provided by NewSouth under this Agreement. NewSouth shall indemnify, hold harmless and defend BellSouth from and against any damages, losses, liabilities, demands claims, suits, judgments, costs and expenses (including but not limited to reasonable attorneys' fees and expenses) arising from BellSouth's tariff obligations or otherwise and resulting from or arising out of any third party's claim of inaccurate NewSouth listings or use of the SLI provided pursuant to this Agreement. BellSouth shall forward to NewSouth any complaints received by BellSouth relating to the accuracy or quality of NewSouth listings.

5.3.4 Listings and subsequent updates will be released consistent with BellSouth system changes and/or update scheduling requirements.

5.4 Unlisted/Non-Published Subscribers. NewSouth will be required to provide to BellSouth the names, addresses and telephone numbers of all NewSouth customers that wish to be omitted from directories.

5.5 Inclusion of NewSouth Customers in Directory Assistance Database. BellSouth will include and maintain NewSouth subscriber listings in BellSouth's Directory Assistance databases at no recurring charge and NewSouth shall provide such Directory Assistance listings at no recurring charge. BellSouth and NewSouth will formulate appropriate procedures regarding lead-time, timeliness, format and content of listing information.

5.6 Listing Information Confidentiality. BellSouth will accord NewSouth's directory listing information the same level of confidentiality that BellSouth accords its own directory listing information, and BellSouth shall limit access to NewSouth's customer proprietary confidential directory information to those BellSouth employees who are involved in the preparation of listings.

5.7 Optional Listings. Additional listings and optional listings will be offered by BellSouth at tariffed rates as set forth in the General Subscriber Services Tariff.

5.8 Delivery. BellSouth or its agent shall deliver White Pages directories to NewSouth subscribers at no charge or as specified in a separate BAPCO agreement.

6. Bona Fide Request/New Business Request Process for Further Unbundling

If NewSouth is a facilities based provider or a facilities based and resale provider, this section shall apply. BellSouth shall, upon request of NewSouth, provide to NewSouth access to its network elements at any technically feasible point for the provision of NewSouth's telecommunications service where such access is necessary and failure to provide access would impair the ability of NewSouth to provide services that it seeks to offer. Any request by NewSouth for access to a network element, interconnection option, or for the provisioning of any service or product that is not already available shall be treated as a Bona Fide Request/New Business Request, and shall be submitted to BellSouth pursuant to the Bona Fide Request/New Business Request process set forth in Attachment 12 of this Agreement

7. Court Ordered Requests for Call Detail Records and Other Subscriber Information

7.1 To the extent technically feasible, BellSouth maintains call detail records for NewSouth end users for limited time periods and can respond to subpoenas and court ordered requests for this information. BellSouth shall maintain such information for NewSouth end users for the same length of time it maintains such information for its own end users.

7.2 NewSouth agrees that BellSouth will respond to subpoenas and court ordered requests delivered directly to BellSouth for the purpose of providing call detail records when the targeted telephone numbers belong to NewSouth end users. Billing for such requests will be generated by BellSouth and directed to the law enforcement agency initiating the request.

7.3 Where BellSouth is providing to NewSouth telecommunications services for resale or providing to NewSouth the local switching function, then NewSouth agrees that in those cases where NewSouth receives subpoenas or court ordered requests regarding

targeted telephone numbers belonging to NewSouth end users, if NewSouth does not have the requested information, NewSouth will advise the law enforcement agency initiating the request to redirect the subpoena or court ordered request to BellSouth. Where the request has been forwarded to BellSouth, billing for call detail information will be generated by BellSouth and directed to the law enforcement agency initiating the request.

7.4 In all other instances, NewSouth will provide NewSouth end user and/or other customer information that is available to NewSouth in response to subpoenas and court orders for their own customer records. When BellSouth receives subpoenas or court ordered requests regarding targeted telephone numbers belonging to NewSouth end users, BellSouth will advise the law enforcement agency initiating the request to redirect the subpoena or court ordered request to NewSouth.

8. Liability and Indemnification

8.1 BellSouth Liability. BellSouth shall take financial responsibility for its own actions in causing or its lack of action in preventing, unbillable or uncollectible NewSouth revenues.

8.2 NewSouth Liability. In the event that NewSouth consists of two (2) or more separate entities as set forth in the preamble to this Agreement, all such entities shall be jointly and severally liable for the obligations of NewSouth under this Agreement.

8.3 Liability for Acts or Omissions of Third Parties. Neither BellSouth nor NewSouth shall be liable for any act or omission of another telecommunications company providing a portion of the services provided under this Agreement.

8.4 Limitation of Liability.

8.4.1 Each Party's liability to the other for any loss, cost, claim, injury or liability or expense, including reasonable attorney's fees relating to or arising out of any negligent act or omission in its performance of this Agreement whether in contract or in tort, shall be limited to a credit for the actual cost of the services or functions not performed or improperly performed.

8.4.2 Limitations in Tariffs. A Party may, in its sole discretion, provide in its tariffs and contracts with its Customer and third parties that relate to any service, product or function provided or contemplated under this Agreement, that to the maximum extent permitted by Applicable Law, such Party shall not be liable to Customer or third Party for (i) any Loss relating to or arising out of this Agreement, whether in contract, tort or otherwise, that exceeds the amount such Party would have charged that applicable person for the service, product or function that gave rise to such Loss and (ii) Consequential Damages. To the extent that a Party elects not to place in its tariffs or contracts such limitations of liability, and the other Party incurs a Loss as a result thereof, such Party shall indemnify and reimburse the

other Party for that portion of the Loss that would have been limited had the first Party included in its tariffs and contracts the limitations of liability that such other Party included in its own tariffs at the time of such Loss.

8.4.3 Neither BellSouth nor NewSouth shall be liable for damages to the other's terminal location, POI or other company's customers' premises resulting from the furnishing of a service, including, but not limited to, the installation and removal of equipment or associated wiring, except to the extent caused by a company's negligence or willful misconduct or by a company's failure to properly ground a local loop after disconnection.

8.4.4 Except in cases of gross negligence, willful or intentional misconduct, under no circumstance shall a Party be responsible or liable for indirect, incidental, or consequential damages, including, but not limited to, economic loss or lost business or profits, damages arising from the use or performance of equipment or software, or the loss of use of software or equipment, or accessories attached thereto, delay, error, or loss of data. In connection with this limitation of liability, each Party recognizes that the other Party may, from time to time, provide advice, make recommendations, or supply other analyses related to the Services, or facilities described in this Agreement, and, while each Party shall use diligent efforts in this regard, the Parties acknowledge and agree that this limitation of liability shall apply to provision of such advice, recommendations, and analyses.

8.5 Indemnification for Certain Claims. The Party providing services hereunder, its affiliates and its parent company, shall be indemnified, defended and held harmless by the Party receiving services hereunder against any claim, loss or damage arising from the receiving company's use of the services provided under this Agreement pertaining to (1) claims for libel, slander or invasion of privacy arising from the content of the receiving company's own communications, or (2) any claim, loss or damage claimed by the customer of the Party receiving services arising from such company's use or reliance on the providing company's services, actions, duties, or obligations arising out of this Agreement.

8.6 Disclaimer. EXCEPT AS SPECIFICALLY PROVIDED TO THE CONTRARY IN THIS AGREEMENT, NEITHER PARTY MAKES ANY REPRESENTATIONS OR WARRANTIES TO THE OTHER PARTY CONCERNING THE SPECIFIC QUALITY OF ANY SERVICES, OR FACILITIES PROVIDED UNDER THIS AGREEMENT. THE PARTIES DISCLAIM, WITHOUT LIMITATION, ANY WARRANTY OR GUARANTEE OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING, OR FROM USAGES OF TRADE.

9. Intellectual Property Rights and Indemnification

9.1 No License. No patent, copyright, trademark or other proprietary right is licensed, granted or otherwise transferred by this Agreement. NewSouth is strictly

prohibited from any use, including but not limited to in sales, in marketing or advertising of telecommunications services, of any BellSouth name, service mark or trademark.

9.2 Ownership of Intellectual Property. Any intellectual property which originates from or is developed by a Party shall remain in the exclusive ownership of that Party. Except for a limited license to use patents or copyrights to the extent necessary for the Parties to use any facilities or equipment (including software) or to receive any service solely as provided under this Agreement, no license in patent, copyright, trademark or trade secret, or other proprietary or intellectual property right now or hereafter owned, controlled or licensable by a Party, is granted to the other Party or shall be implied or arise by estoppel. It is the responsibility of each Party to ensure at no additional cost to the other Party that it has obtained any necessary licenses in relation to intellectual property of third Parties used in its network that may be required to enable the other Party to use any facilities or equipment (including software), to receive any service, or to perform its respective obligations under this Agreement.

9.3 Indemnification. The Party providing a service pursuant to this Agreement will defend the Party receiving such service or data provided as a result of such service against claims of infringement arising solely from the use by the receiving Party of such service and will indemnify the receiving Party for any damages awarded based solely on such claims in accordance with Section 8 of this Agreement.

9.4 Claim of Infringement. In the event that use of any facilities or equipment (including software), becomes, or in reasonable judgment of the Party who owns the affected network is likely to become, the subject of a claim, action, suit, or proceeding based on intellectual property infringement, then said Party shall promptly and at its sole expense, but subject to the limitations of liability set forth below:

9.4.1 modify or replace the applicable facilities or equipment (including software) while maintaining form and function, or

9.4.2 obtain a license sufficient to allow such use to continue.

9.4.3 In the event 9.4.1 or 9.4.2 are commercially unreasonable, then said Party may, terminate, upon reasonable notice, this contract with respect to use of, or services provided through use of, the affected facilities or equipment (including software), but solely to the extent required to avoid the infringement claim.

9.5 Exception to Obligations. Neither Party's obligations under this Section shall apply to the extent the infringement is caused by: (i) modification of the facilities or equipment (including software) by the indemnitee; (ii) use by the indemnitee of the facilities or equipment (including software) in combination with equipment or facilities (including software) not provided or authorized by the indemnitor provided the facilities or equipment (including software) would not be infringing if

used alone; (iii) conformance to specifications of the indemnitee which would necessarily result in infringement; or (iv) continued use by the indemnitee of the affected facilities or equipment (including software) after being placed on notice to discontinue use as set forth herein.

9.6 Exclusive Remedy. The foregoing shall constitute the Parties' sole and exclusive remedies and obligations with respect to a third party claim of intellectual property infringement arising out of the conduct of business under this Agreement.

10. Proprietary and Confidential Information

10.1 Proprietary and Confidential Information: It may be necessary for BellSouth and NewSouth, each as the "Discloser," to provide to the other party, as "Recipient," certain proprietary and confidential information(including trade secret information) including but not limited to technical, financial, marketing, staffing and business plans and information, strategic information, proposals, request for proposals, specifications, drawings, prices, costs, procedures, processes, business systems, software programs, techniques, customer account data, call detail records and like information (collectively the Discloser's "Information"). All Information shall be provided to Recipient in written or other tangible or electronic form, clearly marked with a confidential and, proprietary notice . Information orally or visually provided to Recipient must be designated by Discloser as confidential and proprietary at the time of such disclosure and must be reduced to writing marked with a confidential and proprietary notice and provided to Recipient within thirty (30) calendar days after such oral or visual disclosure.

10.2 Use and Protection of Information. Recipient shall use the Information solely for the purpose(s) of performing this Agreement, and Recipient shall protect Information from any use, distribution or disclosure except as permitted hereunder. Recipient will use the same standard of care to protect Information as Recipient uses to protect its own similar confidential and proprietary information, but not less than a reasonable standard of care. Recipient may disclose Information solely to the Authorized Representatives of the Recipient who (a) have a substantive need to know such Information in connection with performance of the Agreement; (b) have been advised of the confidential and proprietary nature of the Information; and (c) have personally agreed in writing to protect from unauthorized disclosure all confidential and proprietary information, of whatever source, to which they have access in the course of their employment. "Authorized Representatives" are the officers, directors and employees of Recipient and its Affiliates, as well as Recipient's and its Affiliates' consultants, contractors, counsel and agents. " Affiliates" means any company that is owned in whole or in part, now or in the future, directly or indirectly through a subsidiary, by a party hereto.

10.3 Ownership, Copying & Return of Information. Information remains at all times the property of Discloser. Recipient may make tangible or electronic copies, notes, summaries or extracts of Information only as necessary for use as authorized herein. All such tangible or electronic copies, notes, summaries or

extracts must be marked with the same confidential and proprietary notice as appears on the original. Upon Discloser's request, all or any requested portion of the Information (including, but not limited to, tangible and electronic copies, notes, summaries or extracts of any information) will be promptly returned to Discloser or destroyed, and Recipient will provide Discloser with written certification stating that such Information has been returned or destroyed.

10.4 Exceptions. Discloser's Information does not include: (a) any information publicly disclosed by Discloser; (b) any information Discloser in writing authorizes Recipient to disclose without restriction; (c) any information already lawfully known to Recipient at the time it is disclosed by the Discloser, without an obligation to keep confidential; or (d) any information Recipient lawfully obtains from any source other than Discloser, provided that such source lawfully disclosed and/or independently developed such information. If Recipient is required to provide Information to any court or government agency pursuant to written court order, subpoena, regulation or process of law, Recipient must first provided Discloser with prompt written notice of such requirement and cooperate with Discloser to appropriately protect against or limit the scope of such disclosure. To the fullest extent permitted by law, Recipient will continue to protect as confidential and proprietary all Information disclosed in response to a written court order, subpoena, regulation or process of law.

10.5 Equitable Relief. Recipient acknowledges and agrees that any breach or threatened breach of this Agreement is likely to cause Discloser irreparable harm for which money damages may not be an appropriate or sufficient remedy. Recipient therefore agrees that Discloser or its Affiliates, as the case may be, are entitled to receive injunctive or other equitable relief to remedy or prevent any breach or threatened breach of this Agreement. Such remedy is not the exclusive remedy for any breach or threatened breach of this Agreement, but is in addition to all other rights and remedies available at law or in equity.

10.6 Survival of Confidentiality Obligations. The parties' rights and obligations under this Section 10 shall survive and continue in effect until two (2) years after the expiration or termination date of this Agreement with regard to all Information exchanged during the term of this Agreement. Thereafter, the parties' rights and obligations hereunder survive and continue in effect with respect to any Information that is a trade secret under applicable law.

11. Assignments

Any assignment by either Party to any non-affiliated entity of any right, obligation or duty, or of any other interest hereunder, in whole or in part, without the prior written consent of the other Party shall be void, and such consent shall not be unreasonably withheld. A Party may assign this Agreement or any right, obligation, duty or other interest hereunder to an Affiliate company of the Party without the consent of the other Party. All obligations and duties of any Party under this Agreement shall be binding on all successors in interest and assigns of such Party. No assignment or delegation hereof shall relieve the assignor of its obligations under this Agreement in the event that the assignee fails to perform such obligations.

12. Resolution of Disputes

Except as otherwise stated in this Agreement, the Parties agree that if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, either Party may petition the Commission for a resolution of the dispute. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement.

13. Taxes

13.1 Definition. For purposes of this Section, the terms "taxes" and "fees" shall include but not limited to federal, state or local sales, use, excise, gross receipts or other taxes or tax-like fees of whatever nature and however designated (including tariff surcharges and any fees, charges or other payments, contractual or otherwise, for the use of public streets or rights of way, whether designated as franchise fees or otherwise) imposed, or sought to be imposed, on or with respect to the services furnished hereunder or measured by the charges or payments therefore, excluding any taxes levied on income.

13.2 Taxes and Fees Imposed Directly On Either Providing Party or Purchasing Party.

13.2.1 Taxes and fees imposed on the providing Party, which are not permitted or required to be passed on by the providing Party to its customer, shall be borne and paid by the providing Party.

13.2.2 Taxes and fees imposed on the purchasing Party, which are not required to be collected and/or remitted by the providing Party, shall be borne and paid by the purchasing Party.

13.3 Taxes and Fees Imposed on Purchasing Party But Collected And Remitted By Providing Party.

13.3.1 Taxes and fees imposed on the purchasing Party shall be borne by the purchasing Party, even if the obligation to collect and/or remit such taxes or fees is placed on the providing Party.

13.3.2 To the extent permitted by applicable law, any such taxes and/or fees shall be shown as separate items on applicable billing documents between the Parties. Notwithstanding the foregoing, the purchasing Party shall remain liable for any such taxes and fees regardless of whether they are actually billed by the providing Party at the time that the respective service is billed.

13.3.3 If the purchasing Party determines that in its opinion any such taxes or fees are not payable, the providing Party shall not bill such taxes or fees to the purchasing Party if the purchasing Party provides written certification, reasonably satisfactory to the providing Party, stating that it is exempt or otherwise not subject to the tax or fee, setting forth the basis therefor, and satisfying any other requirements under applicable law. If any authority seeks to collect any such tax or fee that the purchasing Party has determined and certified not to be payable, or any such tax or fee that was not billed by the providing Party, the purchasing Party may contest the same in good faith, at its own expense. In any such contest, the purchasing Party shall promptly furnish the providing Party with copies of all filings in any proceeding, protest, or legal challenge, all rulings issued in connection therewith, and all correspondence between the purchasing Party and the taxing authority.

13.3.4 In the event that all or any portion of an amount sought to be collected must be paid in order to contest the imposition of any such tax or fee, or to avoid the existence of a lien on the assets of the providing Party during the pendency of such contest, the purchasing Party shall be responsible for such payment and shall be entitled to the benefit of any refund or recovery.

13.3.5 If it is ultimately determined that any additional amount of such a tax or fee is due to the imposing authority, the purchasing Party shall pay such additional amount, including any interest and penalties thereon.

13.3.6 Notwithstanding any provision to the contrary, the purchasing Party shall protect, indemnify and hold harmless (and defend at the purchasing Party's expense) the providing Party from and against any such tax or fee, interest or penalties thereon, or other charges or payable expenses (including reasonable attorney fees) with respect thereto, which are incurred by the providing Party in connection with any claim for or contest of any such tax or fee.

13.3.7 Each Party shall notify the other Party in writing of any assessment, proposed assessment or other claim for any additional amount of such a tax or fee by a taxing authority; such notice to be provided, if possible, at least ten (10) days prior to the date by which a response, protest or other appeal must be filed, but in no event later than thirty (30) days after receipt of such assessment, proposed assessment or claim.

13.4 Taxes and Fees Imposed on Providing Party But Passed On To Purchasing Party.

13.4.1 Taxes and fees imposed on the providing Party, which are permitted or required to be passed on by the providing Party to its customer, shall be borne by the purchasing Party.

13.4.2 To the extent permitted by applicable law, any such taxes and/or fees shall be shown as separate items on applicable billing documents between the Parties. Notwithstanding the foregoing, the purchasing Party shall remain liable for any such taxes and fees regardless of whether they are actually billed by the providing Party at the time that the respective service is billed.

13.4.3 If the purchasing Party disagrees with the providing Party's determination as to the application or basis for any such tax or fee, the Parties shall consult with respect to the imposition and billing of such tax or fee. Notwithstanding the foregoing, the providing Party shall retain ultimate responsibility for determining whether and to what extent any such taxes or fees are applicable, and the purchasing Party shall abide by such determination and pay such taxes or fees to the providing Party. The providing Party shall further retain ultimate responsibility for determining whether and how to contest the imposition of such taxes and fees; provided, however, that any such contest undertaken at the request of the purchasing Party shall be at the purchasing Party's expense.

13.4.4 In the event that all or any portion of an amount sought to be collected must be paid in order to contest the imposition of any such tax or fee, or to avoid the existence of a lien on the assets of the providing Party during the pendency of such contest, the purchasing Party shall be responsible for such payment and shall be entitled to the benefit of any refund or recovery.

13.4.5 If it is ultimately determined that any additional amount of such a tax or fee is due to the imposing authority, the purchasing Party shall pay such additional amount, including any interest and penalties thereon.

13.4.6 Notwithstanding any provision to the contrary, the purchasing Party shall protect indemnify and hold harmless (and defend at the purchasing Party's expense) the providing Party from and against any such tax or fee, interest or penalties thereon, or other reasonable charges or payable expenses (including reasonable attorney fees) with respect thereto, which are incurred by the providing Party in connection with any claim for or contest of any such tax or fee.

13.4.7 Each Party shall notify the other Party in writing of any assessment, proposed assessment or other claim for any additional amount of such a tax or fee by a taxing authority; such notice to be provided, if possible, at least ten (10) days prior to the date by which a response, protest or other appeal must be filed, but in no event later than thirty (30) days after receipt of such assessment, proposed assessment or claim.

13.5 Mutual Cooperation. In any contest of a tax or fee by one Party, the other Party shall cooperate fully by providing records, testimony and such additional information or assistance as may reasonably be necessary to pursue the contest. Further, the other Party shall be reimbursed for any reasonable and necessary out-of-pocket copying and travel expenses incurred in assisting in such contest.

14. Force Majeure

In the event performance of this Agreement, or any obligation hereunder, is either directly or indirectly prevented, restricted, or interfered with by reason of fire, flood, earthquake or like acts of God, wars, revolution, civil commotion, explosion, acts of public enemy, embargo, acts of the government in its sovereign capacity, labor difficulties, including without limitation, strikes, slowdowns, picketing, or boycotts, unavailability of equipment from vendor, changes requested by Customer, or any other circumstances beyond the reasonable control and without the fault or negligence of the Party affected, the Party affected, upon giving prompt notice to the other Party, shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction, or interference (and the other Party shall likewise be excused from performance of its obligations on a day-to-day basis until the delay, restriction or interference has ceased); provided however, that the Party so affected shall use diligent efforts to avoid or remove such causes of non-performance and both Parties shall proceed whenever such causes are removed or cease.

15. Network Maintenance and Management

15.1 The Parties shall work cooperatively to implement this Agreement. The Parties shall exchange appropriate information (e.g., maintenance contact numbers, network information, information required to comply with law enforcement and other security agencies of the Government, etc.) as reasonably required to implement and perform this Agreement.

15.2 Each Party hereto shall design, maintain and operate their respective networks as necessary to ensure that the other Party hereto receives service quality which is consistent with generally accepted industry standards at least at parity with the network service quality given to itself, its Affiliates, its End Users or any other Telecommunications Carrier.

15.3 Neither Party shall use any service or facility provided under this Agreement in a manner that impairs the quality of service to other Telecommunications Carriers' or to either Party's End Users. Each Party will provide the other Party notice of any such impairment at the earliest practicable time.

15.4 BellSouth agrees to provide NewSouth prior notice consistent with applicable FCC rules and the Act of changes in the information necessary for the transmission

and routing of services using BellSouth's facilities or networks, as well as other changes that affect the interoperability of those respective facilities and networks. This Agreement is not intended to limit BellSouth's ability to upgrade its network through the incorporation of new equipment, new software or otherwise so long as such upgrades are not inconsistent with BellSouth's obligations to NewSouth under the terms of this Agreement.

16. Modification of Agreement

16.1 BellSouth shall make available, pursuant to 47 USC § 252(i), and the FCC rules and regulations and Court Orders regarding such availability, to NewSouth any interconnection, service, or network element provided under any other agreement filed and approved pursuant to 47 USC § 252 (e).

16.2 If NewSouth changes its name or makes changes to its company structure or identity due to a merger, acquisition, transfer or any other reason, it is the responsibility of NewSouth to notify BellSouth of said change and request that an amendment to this Agreement, if necessary, be executed to reflect said change.

16.3 No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties.

16.4 Execution of this Agreement by either Party does not confirm or infer that the executing Party agrees with any decision(s) issued pursuant to the Telecommunications Act of 1996 and the consequences of those decisions on specific language in this Agreement. Neither Party waives its rights to appeal or otherwise challenge any such decision(s) and each Party reserves all of its rights to pursue any and all legal and/or equitable remedies, including appeals of any such decision(s).

16.5 In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of NewSouth or BellSouth to perform any material terms of this Agreement, NewSouth or BellSouth may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in Section 12.

16.6 If any provision of this Agreement, or the application of such provision to either Party or circumstance, shall be held invalid, the remainder of the Agreement, or the application of any such provision to the Parties or circumstances other than those to which it is held invalid, shall not be effective thereby, provided that the Parties shall attempt to reformulate such invalid provision to give effect to such portions thereof as may be valid without defeating the intent of such provision.

17. Waivers

A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Agreement.

18. Governing Law

This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Georgia, without regard to its conflict of laws principles.

19. Arm's Length Negotiations

This Agreement was executed after arm's length negotiations between the undersigned Parties and reflects the conclusion of the undersigned that this Agreement is in the best interests of all Parties.

20. Notices

20.1 Every notice, consent, approval, or other communications required or contemplated by this Agreement shall be in writing and shall be delivered in person or given by postage prepaid mail, address to:

BellSouth Telecommunications, Inc.

CLEC Account Team
9th Floor
600 North 19th Street
Birmingham, Alabama 35203

and

General Attorney - COU
Suite 4300
675 W. Peachtree St.
Atlanta, GA 30375

NewSouth Communications, Corp.

Senior Vice President
of Network Planning & Provisioning
NewSouth Center
Two N. Main Street
Greenville, SC 29601

and

Vice President of Regulatory Affairs
NewSouth Center
Two N. Main Street
Greenville, SC 29601

or at such other address as the intended recipient previously shall have designated by written notice to the other Party.

20.2 Where specifically required, notices shall be by certified or registered mail. Unless otherwise provided in this Agreement, notice by mail shall be effective on the date it is officially recorded as delivered by return receipt or equivalent, and in the absence of such record of delivery, it shall be presumed to have been delivered the fifth day, or next business day after the fifth day, after it was deposited in the mails.

20.3 BellSouth shall provide NewSouth notice via Internet posting of price changes and of changes to the terms and conditions of services available for resale.

21. Rule of Construction

No rule of construction requiring interpretation against the drafting Party hereof shall apply in the interpretation of this Agreement.

22. Headings of No Force or Effect

The headings of Articles and Sections of this Agreement are for convenience of reference only, and shall in no way define, modify or restrict the meaning or interpretation of the terms or provisions of this Agreement.

23. Multiple Counterparts

This Agreement may be executed multiple counterparts, each of which shall be deemed an original, but all of which shall together constitute but one and the same document.

24. Implementation of Agreement

If NewSouth is a facilities based provider or a facilities based and resale provider, this section shall apply. Within 60 days of the execution of this Agreement, the Parties will adopt a schedule for the implementation of the Agreement. The schedule shall state with specificity time frames for submission of including but not limited to, network design, interconnection points, collocation arrangement requests, pre-sales testing and full operational time frames for the business and residential markets. An implementation template to be used for the implementation schedule is contained in Attachment 10 of this Agreement.

25. Filing of Agreement

25.1 Provided that NewSouth is certified as a CLEC in all applicable states, upon execution of this Agreement it shall be filed with the appropriate state regulatory agency pursuant to the requirements of Section 252 of the Act. If the regulatory agency imposes any filing or public interest notice fees regarding the filing or approval of the Agreement, NewSouth shall be responsible for publishing the required notice and the publication and/or notice costs shall be borne by NewSouth.

25.2 For electronic filing purposes in the State of Louisiana, the CLEC Louisiana Certification Number is required and must be provided by NewSouth prior to execution of the Agreement. The CLEC Louisiana Certification Number for NewSouth is TSP00231.

26. Changes In Subscriber Carrier Selection

26.1 Both Parties hereto shall apply all of the principles set forth in 47 C.F.R. § 64.1100 to the process for End User selection of a primary Local Exchange Carrier. BellSouth shall not require a disconnect order from an NewSouth Customer or another LEC in order to process an NewSouth order for Resale Service for an NewSouth End User. Until the FCC or the Commission adopts final rules and procedures regarding a Customer's selection of a primary Local Exchange Carrier, unless already done so, NewSouth shall deliver to BellSouth a Blanket Representation of Authorization that applies to all orders submitted by NewSouth under this Agreement that require a primary Local Exchange Carrier change. Both Parties hereto shall retain on file all applicable documentation of authorization, including letters of authorization, relating to their End User's selection as its primary Local Exchange Carrier, which documentation shall be available for inspection by the other Party hereto upon reasonable request during normal business hours.

26.2 If an End User denies authorizing a change in his or her primary Local Exchange Carrier selection to a different local exchange carrier ("Unauthorized Switching"), the Party receiving the End User complaint shall switch or caused to be switched that End User back to his preferred carrier in accordance with Applicable Law.

27. **Additional Fair Competition Requirements**

27.1 In the event that either Party transfers facilities or other assets to an Affiliate which are necessary to comply with its obligations under this Agreement, the obligations hereunder shall survive and transfer to such Affiliate.

27.2 BellSouth shall allow local exchange customers of NewSouth to select BellSouth for the provision of intraLATA toll services on a nondiscriminatory basis; provided, however, that prior to establishment of BellSouth as the intraLATA toll carrier for NewSouth local exchange customers, the Parties shall negotiate a billing and collections agreement on commercially reasonable terms whereby NewSouth shall bill the customer on BellSouth's behalf and shall collect from the customer and remit to BellSouth intraLATA toll revenues. NewSouth agrees to bill its customers on BellSouth's behalf for both presubscribed and "dial around" intraLATA toll traffic. The Parties shall exchange customer record data on a timely basis as necessary to bill such customers for intraLATA toll usage.

27.3 BellSouth shall not use information derived from providing services or facilities to NewSouth to create a lead or other information base for a "winback" sales program.

28. **Operational Support Systems (OSS) Rates**

BellSouth has developed and made available the following mechanized systems by which NewSouth may submit LSRs electronically.

LENS	Local Exchange Navigation System
EDI	Electronic Data Interchange
TAG	Telecommunications Access Gateway
RoboTAG	

or such other mechanical systems BellSouth may support for LSRs

LSRs submitted by means of one of these interactive interfaces will incur an OSS electronic ordering charge as specified in the Table below. An individual LSR will be identified for billing purposes by its Purchase Order Number (PON). LSRs submitted by means other than one of these interactive interfaces (mail, fax, courier, etc.) will incur a manual order charge as specified in the table below:

OPERATIONAL SUPPORT SYSTEMS (OSS) RATES	Electronic Per LSR received from the CLEC by one of the OSS interactive interfaces	Manual Per LSR received from the CLEC by means other than one of the OSS interactive interfaces
OSS LSR Charge	$3.50	$19.99
USOC	SOMEC	SOMAN

Note: In addition to the OSS charges, applicable discounted service order and related discounted charges apply per the tariff.

28.1 Denial/Restoral OSS Charge

In the event NewSouth provides a list of customers to be denied and restored, rather than an LSR, each location on the list will require a separate PON and, therefore will be billed as one LSR per location.

28.2 Cancellation OSS Charge

NewSouth will incur an OSS charge for an accepted LSR that is later canceled by NewSouth.

Note: Supplements or clarifications to a previously billed LSR will not incur another OSS charge.

28.3 Threshold Billing Plan (Resale and Number Portability only)

The Parties agree that NewSouth will incur the mechanized rate for all LSRs, both mechanized and manual, if the percentage of mechanized LSRs to total LSRs meets or exceeds the threshold percentages shown below:

Year	Ratio: Mechanized/Total LSRs
2000	80%
2001	90%

The threshold plan will be discontinued in 2002.

BellSouth will track the total LSR volume for each CLEC for each quarter. At the end of that time period, a Percent Electronic LSR calculation will be made for that quarter based on the LSR data tracked in the LCSC. If this percentage exceeds the threshold volume, all of that CLEC's future manual LSRs will be billed at the mechanized LSR rate. To allow time for obtaining and analyzing the data and updating the billing system, this billing change will take place on the first day of the second month following the end of the quarter (e.g. May 1 for 1Q, Aug 1 for 2Q, etc.). There will be no adjustments to the amount billed for previously billed LSRs.

28.4 Network Elements and Other Services Manual Additives

The Commissions in some states have ordered per-element manual additive non-recurring charges (NRC) for Network Elements and Other Services ordered by means other than one of the interactive interfaces. These ordered Network Elements and Other Services manual additive NRCs will apply in these states, rather than the charge per LSR. The per-element charges are listed on the Rate Tables in Attachment 2 of this agreement.

29. **Entire Agreement**

This Agreement and its Attachments, incorporated herein by this reference, sets forth the entire understanding and supersedes prior Agreements between the Parties relating to the subject matter contained herein and merges all prior discussions between them, and neither Party shall be bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in this Agreement or as is contemporaneously or subsequently set forth in writing and executed by a duly authorized officer or representative of the Party to be bound thereby.

This Agreement may include attachments with provisions for the following services:

Network Elements and Other Services
Local Interconnection
Resale
Collocation

The following services are included as options for purchase by NewSouth. NewSouth shall elect said services by written request to its Account Manager if applicable.
Optional Daily Usage File (ODUF)
Enhanced Optional Daily Usage File (EODUF)
Access Daily Usage File (ADUF)
Line Information Database (LIDB) Storage
Centralized Message Distribution Service (CMDS)
Calling Name (CNAM)

IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year above first written.

BellSouth Telecommunications, Inc.	**NewSouth Communications, Corp.**
Signature	**Signature**
Greg Follensbee	Jake E. Jennings
Name	**Name**
Senior Director	Vice President of Regulatory Affairs
Title	**Title**
Date	**Date**

Definitions

Affiliate is defined as a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or equivalent thereof) of more than 10 percent.

Centralized Message Distribution System is the Telcordia (formerly BellCore) administered national system, based in Kansas City, Missouri, used to exchange Exchange Message Interface (EMI) formatted data among host companies.

Commission is defined as the appropriate regulatory agency in each of BellSouth's nine state region, Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

Daily Usage File is the compilation of messages or copies of messages in standard Exchange Message Interface (EMI) format exchanged from BellSouth to a CLEC.

Exchange Message Interface is the nationally administered standard format for the exchange of data among the Exchange Carriers within the telecommunications industry.

Information Service means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

Intercompany Settlements (ICS) is the revenue associated with charges billed by a company other than the company in whose service area such charges were incurred. ICS on a national level includes third number and credit card calls and is administered by Telcordia (formerly BellCore)'s Calling Card and Third Number Settlement System (CATS). Included is traffic that originates in one Regional Bell Operating Company's (RBOC) territory and bills in another RBOC's territory.

Intermediary function is defined as the delivery of traffic from NewSouth; a CLEC other than NewSouth or another telecommunications carrier through the network of BellSouth or NewSouth to an end user of NewSouth; a CLEC other than NewSouth or another telecommunications carrier.

Local Interconnection is defined as 1) the delivery of local traffic to be terminated on each Party's local network so that end users of either Party have the ability to reach end users of the other Party without the use of any access code or substantial delay in the processing of the call; 2) the LEC network features, functions, and capabilities set forth in this Agreement; and 3) Service Provider Number Portability sometimes referred to as temporary telephone number portability to be implemented pursuant to the terms of this Agreement.

Local Traffic is defined in Attachment 3.

Message Distribution is routing determination and subsequent delivery of message data from one company to another. Also included is the interface function with CMDS, where appropriate.

Multiple Exchange Carrier Access Billing ("MECAB") means the document prepared by the Billing Committee of the Ordering and Billing Forum ("OBF:), which functions under the auspices of the Carrier Liaison Committee of the Alliance for Telecommunications Industry Solutions ("ATIS") and by Telcordia (formerly BellCore) as Special Report SR-BDS-000983, Containing the recommended guidelines for the billing of Exchange Service access provided by two or more LECs and/or CLECs or by one LEC in two or more states within a single LATA.

Network Element is defined to mean a facility or equipment used in the provision of a telecommunications service. Such term may include, but is not limited to, features, functions, and capabilities that are provided by means of such facility or equipment, including but not limited to, subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service. BellSouth offers access to the Network Elements, unbundled loops; network interface device; sub-loop elements; local switching; transport; tandem switching; operator systems; signaling; access to call-related databases; dark fiber as set forth in Attachment 2 of this Agreement.

Non-Intercompany Settlement System (NICS) is the Telcordia (formerly BellCore) system that calculates non-intercompany settlements amounts due from one company to another within the same RBOC region. It includes credit card, third number and collect messages.

Percent of Interstate Usage (PIU) is defined as a factor to be applied to terminating access services minutes of use to obtain those minutes that should be rated as interstate access services minutes of use. The numerator includes all interstate "non-intermediary" minutes of use, including interstate minutes of use that are forwarded due to service provider number portability less any interstate minutes of use for Terminating Party Pays services, such as 800 Services. The denominator includes all "non-intermediary", local, interstate, intrastate, toll and access minutes of use adjusted for service provider number portability less all minutes attributable to terminating Party pays services.

Percent Local Usage (PLU) is defined as a factor to be applied to intrastate terminating minutes of use. The numerator shall include all "non-intermediary" local minutes of use adjusted for those minutes of use that only apply local due to Service Provider Number Portability. The denominator is the total intrastate minutes of use including local, intrastate toll, and access, adjusted for Service Provider Number Portability less intrastate terminating Party pays minutes of use.

Revenue Accounting Office (RAO) Status Company is a local exchange company/alternate local exchange company that has been assigned a unique RAO code. Message data exchanged among RAO status companies is grouped (i.e. packed) according to From/To/Bill RAO combinations.

Service Control Points ("SCPs") are defined as databases that store information and have the ability to manipulate data required to offer particular services.

Signal Transfer Points ("STPs") are signaling message switches that interconnect Signaling Links to route signaling messages between switches and databases. STPs enable the exchange of Signaling System 7 ("SS7") messages between switching elements, database elements and STPs. STPs provide access to various BellSouth and third party network elements such as local switching and databases.

Signaling links are dedicated transmission paths carrying signaling messages between carrier switches and signaling networks. Signal Link Transport is a set of two or four dedicated 56 kbps transmission paths between NewSouth designated Signaling Points of Interconnection that provide a diverse transmission path and cross connect to a BellSouth Signal Transfer Point.

Telecommunications means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Telecommunications Service means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Telecommunications Act of 1996 ("Act") means Public Law 104-104 of the United States Congress effective February 8, 1996. The Act amended the Communications Act of 1934 (47, U.S.C. Section 1 et. seq.).

Attachment 2

Network Elements and Other Services

TABLE OF CONTENTS

ACCESS TO NETWORK ELEMENTS AND OTHER SERVICES

1. Introduction

1.1. This Attachment sets forth the unbundled network elements and combinations of unbundled network elements that BellSouth agrees to offer to NewSouth in accordance with its obligations under Section 251(c)(3) of the Act. The specific terms and conditions that apply to the unbundled network elements are described below in this Attachment 2. The price for each unbundled network element and combination of unbundled Network Elements are set forth in Exhibit A of this Agreement. As an option, deaveraged rates, where available, are included in Exhibit A.

1.2. For purposes of this Agreement, "Network Element" is defined to mean a facility or equipment provided by BellSouth on an unbundled basis as is used by the CLEC in the provision of a telecommunications service. These unbundled network elements will be consistent with the requirements of the FCC 319 rule. For purposes of this Agreement, combinations of Network Elements shall be referred to as "Combinations."

1.2.1. Except as otherwise permitted by law, BellSouth shall not impose limitation restrictions or requirements or request for the use of the network elements or combinations that would impair the ability of NewSouth to offer telecommunications service in the manner NewSouth intends.

1.2.2. Except upon request by NewSouth, BellSouth shall not separate requested network elements that BellSouth currently combines.

1.3. BellSouth shall, upon request of NewSouth, and to the extent technically feasible, provide to NewSouth access to its network elements for the provision of NewSouth's telecommunications services. If no rate is identified in the contract, the rate for the specific service or function will be as ordered by the Commision. If the Commission has not ordered a rate then the rates will be as set forth in applicable BellSouth tariff or as negotiated by the Parties upon request by either Party.

1.4. NewSouth may purchase network elements and other services from BellSouth for the purpose of combining such network elements in any manner NewSouth chooses to provide telecommunication services to its intended users, including recreating existing BellSouth services. With the exception of the sub-loop elements, which are located outside of the central office, BellSouth shall deliver the network elements purchased by NewSouth for combining to the designated NewSouth collocation space or any other technically feasible point. The network elements shall be provided as set forth in this Attachment.

1.5. Subject to applicable and effective FCC Rules and Orders as well as effective State Commission Orders, BellSouth will offer combinations of network elements pursuant to such orders. In addition to the combinations set forth in Sections 4 and 5 BellSouth will provide the following combined network elements for purchase by NewSouth. The rate of the following combined network elements is the sum of the individual element prices as set forth in this Attachment. Except as specified below, Order Coordination as defined in Section 2 of Attachment 2 of this Agreement is available for each of these combinations:

- SL1 Loop and cross connect
- SL2 loop and cross connect
- Port and cross connect
- Port and cross connect and common (shared) transport
- Port and vertical features
- SL2 Loop with loop concentration
- Port and common (shared) transport
- SL1 Loop and LNP
- SL2 Loop and LNP

1.6. NewSouth will adopt and adhere to the reasonable and non-discriminatory standards contained in the applicable CLEC Work Center Operational Understanding Agreement regarding maintenance and installation of service. Provided, however, nothing herein, shall override the Parties rights or obligations under this agreement.

1.7. Standards for Network Elements

1.7.1 BellSouth shall comply with the requirements set forth in the technical references, as well as any performance or other requirements identified in this Agreement, to the extent that they are consistent with the greater of BellSouth's actual performance or applicable industry standards.

1.7.2 If one or more of the requirements set forth in this Agreement are in conflict, the parties shall mutually agree on which requirement shall apply. If the parties cannot reach agreement, the dispute resolution process set forth in Section 12 of the General Terms and Conditions of this Agreement, incorporated herein by this reference, shall apply.

2. Unbundled Loops, Integrated Digital Loop Carriers, Network Interfaces Device, Unbundled Loop Concentration (ULC) System, Sub loops and Dark Fiber

2.1 Unbundled Loops

3.5.7 If there is a dispute as to whether BellSouth must provide Packet Switching , such dispute will be resolved according tot the dispute resolution process set forth in Section 12 of the General Terms and Conditions of this Agreement, incorporated herein by this reference.

4. Enhanced Extended Link (EEL)

4.1 For purposes of this Section, references to "Already Combined" network elements shall mean that such network elements are in fact already combined by BellSouth in the BellSouth network to provide service to a particular end user at a particular location.

4.2 Where necessary to comply with an effective FCC and/or State Commission order, or as otherwise mutually agreed by the Parties, BellSouth shall offer access to loop and transport combinations, also known as the Enhanced Extended Link ("EEL") as defined in Section 4.3 below.

4.2.2 Subject to Section 4.2.3 below, BellSouth will provide access to the EEL in the combinations set forth in 4.3 following. This offering is intended to provide connectivity from an end user's location through that end user's SWC to NewSouth's POP serving wire center. The circuit must be used for the purpose of provisioning telecommunications services, including telephone exchange service, to NewSouth's end-user customers. Except as provided for in paragraph 22 of the FCC's Supplemental Order Clarification, released June 2, 2000, in CC Docket No. 96-98 ("June 2, 2000 Order"), the EEL will be connected to NewSouth's facilities in NewSouth's collocation space at the POP SWC. NewSouth may purchase BellSouth's access facilities between NewSouth's POP and NewSouth's collocation space at the POP SWC.

4.2.3 BellSouth shall provide EEL combinations to NewSouth in the state of Georgia regardless of whether or not such EELs are Already Combined. In all other states, BellSouth shall make available to NewSouth those EEL combinations described in Section 4.3 below only to the extent such combinations are Already Combined.

4.2.4 BellSouth will make available EEL combinations to NewSouth in density Zone 1, as defined in 47 C.F.R. 69.123 as of January 1, 1999, in the Miami, Orlando, Fort Lauderdale, Charlotte, New Orleans, Greensboro and Nashville MSAs, regardless of whether or not such EELs are Already Combined.

4.2.5 Additionally, BellSouth shall make available to NewSouth a combination of an unbundled loop and tariffed special access interoffice facilities. To the extent NewSouth will require multiplexing functionality in connection with such combination, BellSouth will provide access to multiplexing within the central office pursuant to the terms, conditions and rates set forth in its Access Services Tariffs. The combination of an unbundled loop and tariffed special access interoffice facilities and any associated

tariffed services, including but not limited to multiplexing, shall not be eligible for conversion to UNEs as described in Section 4.5 below. Where multiplexing functionality is required in connection with loop and transport combinations, such multiplexing will be provided at the rates and on the terms set forth in this Agreement.

4.3 EEL Combinations

4.3.1 DS1 Interoffice Channel + DS1 Channelization + 2-wire VG Local Loop

4.3.2 DS1 Interoffice Channel + DS1 Channelization + 4-wire VG Local Loop

4.3.3 DS1 Interoffice Channel + DS1 Channelization + 2-wire ISDN Local Loop

4.3.4 DS1 Interoffice Channel + DS1 Channelization + 4-wire 56 kbps Local Loop

4.3.5 DS1 Interoffice Channel + DS1 Channelization + 4-wire 64 kbps Local Loop

4.3.6 DS1 Interoffice Channel + DS1 Local Loop

4.3.7 DS3 Interoffice Channel + DS3 Local Loop

4.3.8 STS-1 Interoffice Channel + STS-1 Local Loop

4.3.9 DS3 Interoffice Channel + DS3 Channelization + DS1 Local Loop

4.3.10 STS-1 Interoffice Channel + DS3 Channelization + DS1 Local Loop

4.3.11 2-wire VG Interoffice Channel + 2-wire VG Local Loop

4.3.12 4-wire VG Interoffice Channel + 4-wire VG Local Loop

4.3.13 4-wire 56 kbps Interoffice Channel + 4-wire 56 kbps Local Loop

4.3.14 4-wire 64 kbps Interoffice Channel + 4-wire 64 kbps Local Loop

4.4 Other Network Element Combinations

In the state of Georgia, BellSouth shall make available to NewSouth, in accordance with Section 4.6 below: (1) combinations of network elements other than EELs that are Already Combined; and (2) combinations of network elements other than EELs that are not Already Combined but that BellSouth ordinarily combines in its network. In all other states, BellSouth shall make available to NewSouth, in accordance with Section 4.5 below, combinations of network elements other than EELs only to the extent such combinations are Already Combined.

4.5 Special Access Service Conversions

4.5.1 NewSouth may not convert special access services to combinations of loop and transport network elements, whether or not NewSouth self-provides its entrance facilities (or obtains entrance facilities from a third party), unless NewSouth uses the combination to provide a "significant amount of local exchange service" (as described in Section 4.5.2 below), in addition to exchange access service, to a particular customer. Such conversions of existing special access services pursuant to this section may include facilities within a single density zone (as described in 47 C. F. R. 69.123) or across Density Zones.

4.5.1.2 For the purpose of special access conversions under Section 4.5.1, a "significant amount of local exchange service" is as defined in the FCC's June 2, 2000 Order. The Parties agree to incorporate by reference paragraph 22 of the June 2, 2000 Order. When NewSouth requests conversion of special access circuits, NewSouth will self-certify to BellSouth in the manner specified in paragraph 29 of the June 2, 2000 Order that the circuits to be converted qualify for conversion. In addition there may be extraordinary circumstances where NewSouth is providing a significant amount of local exchange service, but does not qualify under any of the three options set forth in paragraph 22 of June 2, 2000 Order, or under a fourth option set forth below in Section 4.5.2. In such case, NewSouth may petition the FCC for a waiver of the local usage options set forth in the June 2, 2000 Order. If a waiver is granted, then upon NewSouth's request the Parties shall amend this Agreement to the extent necessary to incorporate the terms of such waiver for such extraordinary circumstance.

4.5.1.3 The recurring charges for such combinations shall be the sum of the recurring charge for the applicable UNE loop and transport segments (including multiplexing, if applicable), as set forth in Exhibit C to this Attachment. The nonrecurring charges for such combinations shall be an amount equal to all applicable conversion charges set forth in Exhibit C to this Attachment for conversion of special access circuits to EELs, plus all applicable nonrecurring cross connect charges (set forth in Attachment 4 to this Agreement) required to connect the facility to NewSouth's collocation arrangement. EELs that terminate in NewSouth collocation arrangements may be connected by NewSouth via cross-connects to BellSouth services used by NewSouth to transport traffic between NewSouth's collocation space and NewSouth's POP.

4.5.1.4 Upon request for conversions of up to 15 circuits from special access to EELs, BellSouth shall perform such conversions within seven (7) days from BellSouth's receipt of a valid, error free service order from NewSouth. Requests for conversions of fifteen (15) or more circuits from special access to EELs will be provisioned on a project basis. Except as set forth in Section 4.5.3 below, conversions should not require the special access circuit to be disconnected and reconnected because only the billing information or other administrative information associated with the circuit will change when NewSouth requests a conversion. Submission of a spreadsheet

identifying the circuits to be converted shall serve as a substitute for submission of a local service request (LSR), only until such time as the LSR process is modified to accommodate such requests.

4.5.1.5 BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records not more than once in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. If, based on its audits, BellSouth concludes that NewSouth is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process set forth in this Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from NewSouth.

4.5.2 In addition to the circumstances under which NewSouth may identify special access circuits that qualify for conversions to EELs (referenced in Section 4.5.1.2 above), NewSouth also shall be entitled to convert special access circuits to unbundled network elements pursuant to the terms of this section 4.5.2 et seq.

4.5.2.1 Upon request by NewSouth, BellSouth will convert special access circuits to combinations of an unbundled loop connected to special access transport provided that: (1) the combination terminates to a NewSouth collocation arrangement; and (2) NewSouth certifies, in the manner set forth in Section 4.5.2 above, that at least 75% of the unbundled network element(s) component of the facility is used to provide originating and terminating local voice traffic. The recurring charges for such combinations shall be the sum of the recurring charge for the applicable UNE loop, as set forth in Exhibit C to this Attachment, and all applicable recurring charges for the special access transport facility, as set forth in the BellSouth tariff under which such facilities were ordered. The nonrecurring charges for such combinations shall be an amount equal to all applicable conversion charges set forth in Exhibit C to this Attachment for conversion of special access circuits to EELs, plus the applicable nonrecurring cross connect charges (set forth in Attachment 4 to this Agreement) required to connect the facility to NewSouth's collocation arrangement. Such combinations that terminate in NewSouth collocation arrangements may be connected by NewSouth via cross-connects to BellSouth services used by NewSouth to transport traffic between NewSouth's collocation space and NewSouth's POP.

4.5.2.2 Upon request from NewSouth to convert special access circuits pursuant to Section 4.5.2, BellSouth shall have the right, upon 10 business days notice, to conduct an audit prior to any such conversion to determine whether the subject facilities meet local usage requirements set forth in Section 4.5.2. An audit conducted pursuant to this Section shall take into account a usage period of the past three (3) consecutive

months, and shall be subject to the requirements for audits as set forth in the June 2, 2000 Order, except as expressly modified herein.

4.5.3 In consideration of Section 4.5.2.1 above, and subject to Section 4.5.7 below, for those special access circuits identified by NewSouth in writing as of January 19, 2001 as being eligible for conversion pursuant to the terms of this Agreement, BellSouth will provide to NewSouth a credit in an amount equal to three times the difference between the monthly special access rates for such circuits and the monthly rates for the combinations to which those circuits are converted.

4.5.3.1 For circuits converted pursuant to one of the three options made available to NewSouth in Section 4.5.1, the credit will be in an amount equal to three times the difference between the monthly special access rates for such circuits and the monthly UNE recurring charges for the loop, transport and multiplexing (if applicable), as set forth in Exhibit C to this Attachment, that, in combination, form an EEL.

4.5.3.2 For circuits converted pursuant to the fourth option made available to NewSouth in Section 4.5.2, the credit will be in an amount equal to three times the difference between the monthly special access rates for such circuits and the sum of the monthly UNE recurring charges for the loop, as set forth in Exhibit C to this Attachment, and the monthly recurring charge for the special access transport facility, as set forth in the BellSouth tariff under which such facility was ordered.

4.5.3.3 Such credits will be applied to NewSouth's bill within sixty (60) days following execution of this Agreement.

4.5.3.4 Within ten (10) days following execution of this Agreement, NewSouth shall certify to BellSouth in writing that the circuits designated as of January 19, 2001 meet significant local use requirements of one of the four conversion options set forth above. Such certification shall include a designation by NewSouth of which of the particular four conversion options specified herein is applicable to each of the individual circuits designated as of January 19, 2001.

4.5.3.5 BellSouth shall assign a project management team and designate a project manager to facilitate the timely conversion of special access circuits. BellSouth and NewSouth will participate in a joint implementation meeting within fifteen (15) days following execution of this Agreement, or within 15 days of any subsequent request for conversion, to establish a schedule for conversion of the identified special access circuits. BellSouth shall complete conversions of all circuits identified by NewSouth as of January 19, 2001 within 3 months of the joint implementation meeting, unless an alternative completion date is agreed to by the Parties. For purposes of conversion of the circuits identified by NewSouth as of January 19, 2001, NewSouth's spreadsheet identifying the circuits to be converted shall serve as a substitute for submission of a local service request (LSR). For subsequent conversion requests pursuant to Sections 4.5.1 and 4.5.2 above, submission of a spreadsheet identifying the circuits to be

converted shall serve as a substitute for submission of a local service request (LSR), only until such time as the LSR process is modified to accommodate such requests.

4.5.4 For all special access circuits converted under this Agreement, NewSouth shall pay BellSouth any termination charges applicable to the special access circuits converted, as specified in BellSouth's tariffs.

4.5.5 The Parties acknowledge that the conversion option described in Section 4.5.2 and the credits offered NewSouth in Section 4.5.3 constitute a reasonable negotiated alternative to those developed by the FCC in the June 2, 2000 Order. However, BellSouth has agreed to the terms of Sections 4.5.2 and 4.5.3 based upon the assumption that the FCC's current rules regarding special access conversions will remain in effect throughout the 2001 calendar year. In the event that the FCC modifies its rules regarding conversion of special access circuits in a manner that is inconsistent with BellSouth's stated position on the issue, then BellSouth cannot realize the value of the alternative option made available to NewSouth hereunder. In the event that the FCC rules regarding special access conversions are modified in the manner described herein with an effective date prior to January 1, 2002, NewSouth will reimburse BellSouth one-seventh of the credits extended to NewSouth under Section 4.5.3 above for each month or portion thereof prior to January 1, 2002, that such modified FCC rules are in effect.

4.6 Rates

4.6.1 Georgia

4.6.1.1 The non-recurring and recurring rates for the EEL Combinations of network elements set forth in 4.3, whether Already Combined or new, are as set forth in this Attachment.

4.6.1.2 On an interim basis, for combinations of loop and transport network elements not set forth in Section 4.3, where the elements are not Already Combined but are ordinarily combined in BellSouth's network, the non-recurring and recurring charges for such UNE combinations shall be the sum of the stand-alone non-recurring and recurring charges of the network elements which make up the combination. These interim rates shall be subject to true-up based on the Commission's review of BellSouth's cost studies.

4.6.1.3 To the extent that NewSouth seeks to obtain other combinations of network elements that BellSouth ordinarily combines in its network which have not been specifically priced by the Commission when purchased in combined form, NewSouth, at its option, can request that such rates be determined pursuant to the Bona Fide Request/New Business Request (NBR) process set forth in this Agreement.

4.6.2 All Other States

4.6.2.1 Subject to Section 4.2.3 and 4.4 preceding, all other states, the rates for (1) Already Combined EEL combinations set forth in Section 4.3, and (2) other combinations of network elements that are Already Combined in the network will be the sum of the

recurring rates for the individual network elements plus a nonrecurring charge as specified in Exhibit C of this Attachment.

4.6.2.2 Rates for new EEL combinations in Density Zone 1 in the Miami, Orlando, Fort Lauderdale, Charlotte, New Orleans, Greensboro and Nashville MSAs shall be as set forth in Exhibit C hereto; provided, however, that to the extent a rate is not established in Exhibit C, the rate shall be the sum of the recurring and nonrecurring charges for the individual network elements as set forth in Exhibit C to this Attachment, unless otherwise established by the Commission.

5. Port/Loop Combinations

5.1 For purposes of this Section, references to "Already Combined" network elements shall mean that such network elements are in fact already combined by BellSouth in the BellSouth network to provide service to a particular end user at a particular location. For purposes of this Section, "soft dial tone" (i.e., where network elements are connected through from the end user premises to the BellSouth end office and no dispatch is required to initiate service) shall be considered "Already Combined".

5.2 At NewSouth's request, BellSouth shall provide access to combinations of port and loop network elements, as set forth in Section 5.5 below, that are Already Combined in BellSouth's network except as specified in Sections 5.2.1 and 5.2.2 below, consistent with the requirements of 47 C.F.R. 315(b) and all applicable FCC and Commission rules and policies.

5.2.1 BellSouth shall not provide access to combinations of unbundled port and loop network elements in locations where, pursuant to FCC rules, BellSouth is not required to provide circuit switching as an unbundled network element.

5.2.2 In accordance with effective and applicable FCC rules, BellSouth shall not provide unbundled circuit switching in density Zone 1, as defined in 47 C.F.R. 69.123 as of January 1, 1999, of the Atlanta, Miami, Orlando, Fort Lauderdale, Charlotte, New Orleans, Greensboro and Nashville MSAs to NewSouth if NewSouth's customer has 4 or more DS0 equivalent lines.

5.3 Combinations of port and loop network elements provide local exchange service for the origination or termination of calls. BellSouth shall make available the following loop and port combinations at the terms and at the rates set forth below:

5.3.2.1 In Georgia, BellSouth shall provide to NewSouth combinations of port and loop network elements to NewSouth on an unbundled basis regardless of whether or not such combinations are Currently Combined except in those locations where BellSouth is not required to provide circuit switching, as set forth in Section 5.2.2 above. The rates for such combinations shall be the cost based rates set forth in Exhibit C of this Attachment.

EXHIBIT B

BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30075

Jerry D. Hendrix
Executive Director

(404) 927-7503
Fax (404) 529-7839
e-mail: jerry.hendrix@bellsouth.com

April 26, 2002

VIA ELECTRONIC AND OVERNIGHT MAIL

Jake Jennings
Vice President of Regulatory Affairs
NewSouth Communications, Corp.
NewSouth Center
Two N. Main Street
Greenville, SC 29601

Dear Jake:

NewSouth has requested BellSouth to convert numerous special access circuits to Unbundled Network Elements (UNEs). Pursuant to those request, BellSouth has converted many of those circuits in accordance with BellSouth procedures. Some of the circuits were not converted due to various reasons, (e.g., previously disconnected, duplicates, etc.).

Consistent with the FCC Supplemental Order Clarification, Docket No. 96-98, BellSouth has selected an independent third party, American Consultants Alliance (ACA), to conduct an audit. The purpose of this audit is to verify NewSouth's local usage certification and compliance with the significant local usage requirements of the FCC Supplemental Order.

In the Supplemental Order Clarification, Docket No. 96-98 adopted May 19, 2000 and released June 2, 2000 ("Supplemental Order"), the FCC stated:

> "We clarify that incumbent local exchange carriers (LECs) must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements, and we allow incumbent LECs to subsequently conduct limited audits by an independent third party to verify the carrier's compliance with the significant local usage requirements."

Accompanying this letter, please find a Confidentiality and Non-Disclosure Agreement on proprietary information and Attachment A, which provides a list of the information ACA needs from NewSouth.

NewSouth is required to maintain appropriate records to support local usage and self-certification. ACA will audit NewSouth's supporting records to determine compliance of

each circuit converted with the significant local usage requirements of the Supplemental Order.

In order to minimize disruption of NewSouth's daily operations and conduct an efficient audit, ACA has assigned senior auditors who have expertise in auditing, special access circuit records and the associated facilities, minutes of use traffic studies, CDR records recorded at the switch for use in billing, and Unbundled Network Elements.

BellSouth will pay for American Consultants Alliance to perform the audit. In accordance with the Supplemental Order, NewSouth is required to reimburse BellSouth for the audit if the audit uncovers non-compliance with the local usage options on 20% or more of the circuits audited. This is consistent with established industry practice for jurisdictional report audits. BellSouth hopes that in the event circuits are found to be non-compliant, the parties can reach agreement as to the appropriate remedy; however, in the event that the parties cannot, in accordance with the interconnection agreements, BellSouth will seek dispute resolution from the appropriate Commission(s). BellSouth will seek reimbursement for the cost of the audit and will seek to convert the circuits back to special access for the appropriate non-recurring charges for the special access services. In addition, BellSouth will seek reimbursement for the difference between the UNE charges paid for those circuits since they were converted and the special access charges that should have applied.

Per the Supplemental Order, BellSouth is providing at least 30 days written notice that we desire the audit to commence on May 27, 2002 at NewSouth's office in Greenville or another NewSouth location as agreed to by both parties. Our experience in other audits has indicated that it typically takes two weeks to complete the review. Thus, we request that NewSouth plan for ACA to be on-site for two weeks. Our audit team will consist of 3 auditors and an ACA partner in charge.

NewSouth will need to supply conference room arrangements at your facility. Our auditors will also need the capability to read your supporting data, however you choose to provide it (file on PC, listing on a printout, etc.). It is desirable to have a pre-audit conference next week with your lead representative. Please have your representative call Shelley Walls at (404) 927-7511 to schedule a suitable time for the pre-audit planning call.

BellSouth has forwarded a copy of this notice to the FCC, as required in the Supplemental Order. This allows the FCC to monitor implementation of the interim requirements for the provision of unbundled loop-transport combinations.

If you have any questions regarding the audit, please contact Shelley Walls at (404) 927-7511. Thank you for your cooperation.

Sincerely,

Jerry D. Hendrix
Executive Director

Enclosures

cc: Michelle Carey, FCC (via electronic mail)
Jodie Donovan-May, FCC (via electronic mail)
Andrew Caldarello, BellSouth (via electronic mail)
Larry Fowler, ACA (via electronic mail)
Sr. Vice President of Network Planning & Provisioning, NewSouth (via U.S. mail)

Audit to Determine the Compliance Of Circuits Converted by NewSouth From BellSouth's Special Access Tariff to Unbundled Network Elements With The FCC Supplemental Order Clarification, Docket No. 96-98

Information to be Available On-site May 27, 2002

Prior to the audit, ACA or BellSouth will provide NewSouth the circuit records as recorded by BellSouth for the circuits requested by NewSouth that have been converted from BellSouth's special access services to unbundled network elements. These records will include the option under which NewSouth self-certified that each circuit was providing a significant amount of local exchange service to a particular customer, in accordance with the FCC's Supplemental Order Clarification.

Please provide:

NewSouth's supporting records to determine compliance of each circuit converted with the significant local usage requirements of the Supplemental Order Clarification.

First Option: NewSouth is the end user's only local service provider.

- Please provide a Letter of Agency or other similar document signed by the end user, or
- Please provide other written documentation for support that NewSouth is the end user's only local service provider.

Second Option: NewSouth provides local exchange and exchange access service to the end user customer's premises but is not the exclusive provider of an end user's local exchange service.

- Please provide the total traffic and the local traffic separately identified and measured as a percent of total end user customer local dial tone lines.
- For DS1 circuits and above please provide total traffic and the local voice traffic separately identified individually on each of the activated channels on the loop portion of the loop-transport combination.
- Please provide the total traffic and the local voice traffic separately identified on the entire loop facility.
- When a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), please provide the above total traffic and the local voice traffic separately identified for each individual DS1 circuit.

Third Option: NewSouth provides local exchange and exchange access service to the end user customer's premises but is not the exclusive provider of an end user's local exchange service.

- Please provide the number of activated channels on a circuit that provide originating and terminating local dial tone service.
- Please provide the total traffic and the local voice traffic separately identified on each of these local dial tone channels.

- Please provide the total traffic and the local voice traffic separately identified for the entire loop facility.
- When a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), please provide the above total traffic and the local voice traffic separately identified for each individual DS1 circuit.

Depending on which one of the three circumstances NewSouth chose for self certification, other supporting information may be required.

THIS NONDISCLOSURE AGREEMENT (herein the "Agreement") is dated and effective as of _____ ("Effective Date"), between BellSouth Telecommunications, Inc., a Georgia corporation, with its corporate office located at 675 W. Peachtree, Atlanta, Georgia ("BellSouth"), and NewSouth Communications, Corp., a Delaware corporation, located at Greenville, South Carolina ("Discloser," "you" or "your").

RECITALS

A. BellSouth acknowledges that it may be necessary for you to provide BellSouth and its Affiliates with certain information, considered by you to be confidential, valuable and proprietary, which BellSouth and its Affiliates are receiving for the purpose of verifying your compliance with the significant local usage requirements of the FCC Supplemental Order Clarification, Docket No. 96-98 (the "Project"). "Affiliates" means any company owned in whole or in part, now or in the future, by BellSouth Corporation or by one or more of its direct or indirect subsidiaries controlled by BellSouth Corporation.

B. Such confidential and proprietary information may include, but is not limited to, your business, financial and technical information, proposed products and services and like information, and the results of or information contained in any audit conducted in connection with the Project (collectively your "Information").

IN CONSIDERATION of the mutual promises and obligations contained herein and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the parties agree as follows:

1. BellSouth will protect Information you provide to BellSouth, and Information that any auditor engaged in connection with the Project provides to BellSouth, from use, distribution or disclosure except in connection with the Project. BellSouth may disclose Information only to the Affiliates, employees, consultants, contractors and agents of BellSouth with a need to know such Information in connection with the Project. BellSouth will make copies of Information only as necessary for its use in connection with the Project. Notwithstanding the foregoing, BellSouth may disclose such Information to the extent reasonably necessary to enforce its rights under any interconnection agreements between you and BellSouth or under rules and orders of the Federal Communications Commission applicable to the Project. BellSouth will cooperate with you to protect the confidentiality of such Information in the event of disclosure pursuant to this paragraph.

2. All Information must be provided by you to BellSouth in written or other tangible or electronic form, marked by you with a confidential and proprietary notice. Information orally provided by you to BellSouth must be designated as confidential and proprietary prior to such oral disclosure and must be reduced by you to writing, marked with a confidential and proprietary notice, and provided to BellSouth within ten (10) calendar days after such oral disclosure.

3. Your Information does not include:
   (a) any information you publicly disclose;
   (b) any information you in writing authorize BellSouth or its Affiliates to disclose without restriction;
   (c) any information already lawfully known to BellSouth or its Affiliates at the time you disclose it, without an obligation to keep it confidential;
   (d) any information BellSouth or its Affiliates lawfully obtain from any source other than you, provided that such source lawfully disclosed such information;
   (e) any information BellSouth or its Affiliates independently develop; or
   (f) any information BellSouth or its Affiliates is required to disclose to any governmental agency or court by written order, subpoena, regulation or process of law, but only to the extent of such required disclosure.

4. You will not identify BellSouth or its Affiliates in any advertising, sales material, press release, public disclosure or publicity without prior written authorization of BellSouth. No license under any trademark, patent or copyright is either granted or implied by disclosure of Information to BellSouth.

5. The term of this Agreement and BellSouth's obligations hereunder will extend for a period of one (1) year after the Effective Date.

6. No forbearance, failure or delay by either party in exercising any right, power or privilege is waiver thereof, nor does any single or partial exercise thereof preclude any other or futur exercise thereof, or the exercise of any other right, power o privilege.

7. If and to the extent any provision of this Agreement is hel invalid or unenforceable at law, such provision will be deeme stricken from the Agreement and the remainder of th Agreement will continue in effect and be valid and enforceabl to the fullest extent permitted by law.

8. This Agreement is binding upon and inures to the benefit of th parties and their heirs, executors, legal and person representatives, successors and assigns, as the case may b

You may not assign this Agreement except by prior written consent of BellSouth, and any attempted assignment without such authorization is void.

9. This Agreement shall be deemed executed in the State of Georgia, U.S.A., and is to be governed and construed by Georgia law, without regard to its choice of law provisions. The parties agree that exclusive jurisdiction and venue for any action to enforce this Agreement are properly in the applicable federal or state court for Georgia.

10. This Agreement is the entire agreement between the parties hereunder and may not be modified or amended except by a written instrument signed by both parties. Each party has read this Agreement, understands it and agrees to be bound by its terms and conditions. There are no understandings or representations with respect to the subject matter hereof, express or implied, that are not stated herein. This Agreement may be executed in counterparts, and signatures exchanged by facsimile or other electronic means are effective for all purposes hereunder to the same extent as original signatures.

IN WITNESS WHEREOF, the parties' authorized representatives have signed this Agreement:

BELLSOUTH: _____	DISCLOSER: _____
By: _____ (Authorized Signature)	By: _____ (Authorized Signature)
Name: _____ (Print or Type)	Name: _____ (Print or Type)
Title: _____	Title: _____

EXHIBIT C

BELLSOUTH

BellSouth
Suite 900
1133-21st Street, N.W.
Washington, D.C. 20036-3351

whit.jordan@bellsouth.com

W. W. (Whit) Jordan
Vice President-Federal Regulatory

202 463-4114
Fax 202 463-4198

June 20, 2002

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CC Docket No. 96-98

Dear Ms. Dortch:

The Commission's *Supplemental Order Clarification* ("*SOC*") in CC Docket No. 96-98 released on June 2, 2000 allows an incumbent local exchange carrier to conduct audits by an independent third party to verify compliance with the *SOC*'s local usage requirements. Pursuant to the *SOC*, BellSouth notified certain carriers of BellSouth's desire to have an audit conducted. BellSouth also notified the Commission staff via electronic copy of the audit request letters that it had requested audits of certain carriers. As requested by the staff, BellSouth is submitting the following list of carriers that have been notified by letter of BellSouth's intent to have an audit conducted pursuant to the *SOC*:

1) MCI
2) NuVox
3) XO
4) NewSouth
5) Intermedia
6) Florida Digital Network
7) Madison River
8) cbeyond
9) IDS
10) mpower
11) e.spire
12) Allegiance
13) ITC^DeltaCom

In accordance with Section 1.1206 of the Commission's rules, I am filing two copies of this notice and request that you associate this notice with the record in the above referenced proceeding. Please call me if you have any questions.

Sincerely,

W.W. Jordan

CC: Michelle Carey
Jeremy Miller

EXHIBIT D

BELLSOUTH

BellSouth
Suite 900
1133-21st Street, N.W.
Washington, D.C. 20036-3351

whit.jordan@bellsouth.com

W. W. (Whit) Jordan
Vice President-Federal Regulatory

202 463-4114
Fax 202 463-4198

June 24, 2002

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445th Street, SW
Washington, DC 20554

Re: CC Docket No. 96-98

Dear Ms.Dortch:

On June 21,2002, Jerry Hendrix, Parkey Jordan, Shelley Walls, Glenn Reynolds and the undersigned, all representing BellSouth, met with Michelle Carey, Jeremy Miller, Julie Veach and Greg Cooke from the Competition Policy Division of the Wireline Competition Bureau in connection with the above referenced proceeding. During this meeting, BellSouth explained its process for conducting audits to verify a carrier's compliance with the local usage requirements from the Commission's *Supplemental Order Clarification* in CC Docket No.96-98 released on June 2, 2000. BellSouth used the attached material in the meeting.

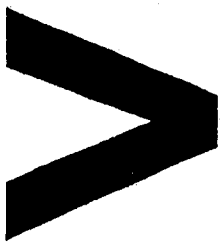
In accordance with Section 1.1206 of the Commission's rules, I am filing two copies of this notice and request that you associate this notice with the record in the above referenced proceeding. Please call me if you have any questions.

Sincerely,

W.W Jordan

Attachment

CC: Michelle Carey
Jeremy Miller
Julie Veach
Greg Cooke



EELs Audits

June 21, 2002

Audits are not conducted routinely ...

- No audits have been conducted in the past although BellSouth has had the right to audit for more than 2 years
- There are approximately 15 audits in process at this time
- There are no specific plans to audit specific carriers or a specific number of carriers
- Audits are only conducted when a concern is raised by pre-specified criteria

When is an audit initiated?

- Purpose: Ensure, as allowed by the FCC's orders, compliance with the agreements and the FCC's orders
- Process
  - Developed a uniform evaluation process
  - Regular reviews looking for specific "flags" that trigger concern
  - Review interconnection agreement
  - Engage auditor
  - Notify carrier and FCC
  - Pre-audit meeting with auditor and representatives from both carriers
  - Begin audit

Flags that trigger concern ...

- Past problems with self-reported jurisdictionalization of traffic
- Unusually low percent local terminating traffic on a statewide basis (higher weighting given to lower percentage)
  - ≤ 25%
  - ≤ 50%
  - ≤ 75%
- Carrier statements that indicate that safe harbors are not being met
- Claims to offer only or primarily data services
- Claims to offer only or primarily long distance services

The auditor ...

- BellSouth has hired and paid for an independent auditor, as required by the FCC's orders
- ACA was hired because:
  - Its staff is composed of telecommunications professionals with a background in the industry
  - Its principals understand the FCC's Orders on this subject
    - BellSouth was not required to provide any education to the audit teams
    - If another firm had been hired which required education on the subject, BellSouth could have been accused of biasing the auditors
  - Its proposal minimized the costs and time involved in the audits
  - **There was no prior relationship between BellSouth and ACA**

BellSouth has fully complied with the FCC's Orders in exercising its right to audit by:

- ***Conducting audits only when it has a concern that the safe harbors are not being met***
- ***Hiring an independent auditor***

EXHIBIT E

NewSouth communications

May 3, 2002

Via Overnight Mail

Mr. Jerry Hendrix
BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30075

RE: EEL Audit

Dear Jerry:

I am receipt of your April 26, 2002 letter notifying NewSouth of BellSouth's intent to audit special access circuits that have been converted to unbundled loop/transport combinations ("Enhanced Extended Links – EELs"). NewSouth is willing to work with BellSouth in order to facilitate the audit of NewSouth's special access circuits converted to EELs subject to the requirements set forth in the Federal Communications Commission's Supplemental Order Clarification, Docket No. 96-98, adopted May 19, 2000 and released, June 2, 2000 *("Supplemental Order")*.

As you point out in your April 26, 2002 letter, it is BellSouth's obligation to "*hire and pay for*" the independent auditor unless it is determined that NewSouth is non-complaint with the Supplemental Order. NewSouth disagrees with BellSouth's interpretation of the Supplement Order requiring NewSouth to pay for the audit if NewSouth is non-compliant with the *"local usage options on 20% or more of the audited circuits."* There is no such requirement listed in the FCC's Supplemental Order. NewSouth is willing to discuss the cost of the audit based on a finding of non-compliance, if such discussions are warranted. To the extent that we are unable to reach agreement concerning the final disposition of the audit, NewSouth will seek appropriate relief through the Dispute Resolution Process of the BellSouth/NewSouth Interconnection Agreement, dated May 18, 2001.

In addition, in the Supplemental Order, order at para. 32 states the FCC *"emphasize(s) that an audit should not impose an undue financial burden on smaller requesting carriers that may not keep extensive records, and find that, in the event of an audit, the incumbent LEC should verify compliance for these carriers using the records that the carriers keep in the normal course of business."* Therefore, NewSouth will provide the BellSouth audit team with only those records that are kept in the normal course of business. To the extent that BellSouth's audit places undue financial burden on NewSouth, w hereby notify BellSouth of our intent to seek reimbursement of reasonable costs and expenses imposed by this audit.

NewSouth sees no need to execute the proposed BellSouth Confidentiality and Non-Disclosure Agreement attached to your April 26, 2002 letter. Instead, NewSouth recommends that we utilize the confidentiality provisions set forth in Section 10, General Terms and Conditions – Part B of the BellSouth/NewSouth Interconnection Agreement dated May 18, 2002.

In order to facilitate the audit of NewSouth's special access circuits "converted" to EELs, I have assigned John Fury, Manager of Carrier Relations to act as a single point of contact for the BellSouth audit team. Mr. Fury can be reached at 864-672-5064 to discuss the audit. We will contact BellSouth to schedule a pre-audit conference call.

Sincerely,

Jake E. Jennings
Vice President - Regulatory Affairs
NewSouth Communications Corp.

cc: Kyle D. Dixon, FCC (via electronic mail)
Matthew Brill, FCC (via electronic mail)
Daniel Gonzalez, FCC (via electronic mail)
Jordan Goldstein, FCC (via electronic mail)
Dorothy Attwood, FCC (via electronic mail)
Michelle Carey, FCC (via electronic mail)
Jodie Donovan-May, FCC (via electronic mail)
Andrew Caldarello, BellSouth (via electronic mail)
Larry Fowler, BellSouth (via electronic mail)
John Fury, NewSouth (via electronic mail)
Amy Gardner, NewSouth (via electronic mail)

NewSouth Communications Corporation
Two North Main Street, Greenville, South Carolina 29601
Telephone: 864-672-5000 // Facsimile: 864-672-5105
www.newsouth.com

EXHIBIT F

NewSouth communications

May 23, 2002

Via overnight and Electronic Mail

Mr. Jerry Hendrix
BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30375

RE: EEL Audit

Dear Jerry:

Based upon new information and further consideration, NewSouth formally disputes BellSouth's request to audit special access circuits that have been converted to unbundled loop/transport combinations ("Enhanced Extended Links – EELs"). To the extent that we are unable to reach agreement concerning the final disposition of the audit, and BellSouth still insists on having one, BellSouth should seek appropriate relief through the Dispute Resolution Process of the BellSouth/NewSouth Interconnection Agreement, dated May 18, 2001. NewSouth, too, may seek regulatory agency involvement as a means of resolving this issue.

As you now may be aware, the Federal Communications Commission's Supplemental Order Clarification Order, Docket No. 96-98 adopted May 19, 2000 and released June 2, 2000 ("Supplemental Order") clearly stated that (1) audits may not be routine and only be conducted under limited circumstances;[1] and (2) audit must be performed by an independent third party hired and paid for by the incumbent local exchange company.[2] Based on information recently discovered by NewSouth – much of it included in the Petition for Declaratory Rulemaking of NuVox, Inc. filed in FCC Docket 96-98 on May 17, 2002, it is NewSouth's opinion that neither of these requirements has been met.

Indeed, just as BellSouth failed to state a reasonable "concern" regarding compliance with respect to NuVox, it also has failed to do so with NewSouth in its April 26, 2002 letter. Moreover, NewSouth understands that BellSouth's audit request to NewSouth is one of at least a dozen – demonstrating BellSouth's defiance of the FCC's directive (and its own prior commitment) that such audits will not be routine.

[1] *Supplemental Order Clarification*, para. 31, n. 86.
[2] *Supplemental Order Clarification*, para. 31.

NewSouth Communications
Two North Main Street
Greenville, SC 29601
864-672-5000

Although I initially accepted BellSouth's assertion that its selected auditor is independent, the allegations in the NuVox petition compel me to reject that assertion now, as I have been able to confirm that the same auditor has been hired to conduct the audits of both NuVox's and NewSouth's records. If BellSouth wishes to renew its audit request, NewSouth insists that a new and truly independent auditor be selected if it is determined that such an audit is warranted. NewSouth remains willing to discuss these and several other unresolved issues regarding BellSouth's audit request. However, until these threshold issues are resolved to NewSouth's satisfaction or resolved by the FCC, NewSouth is unwilling to devote precious resources toward the proposed unauthorized audit of NewSouth's converted EEL circuits.

Sincerely,

Jake E. Jennings
Vice President - Regulatory Affairs
NewSouth Communications Corp.

cc: Kyle Dixon, FCC (via electronic mail)
Matthew Brill, FCC (via electronic mail)
Daniel Gonzalez, FCC (via electronic mail)
Jordan Goldstein, FCC (via electronic mail)
Dorothy Attwood, FCC (via electronic mail)
Michelle Carey, FCC (via electronic mail)
Jodie Donnovan-May (via electronic mail)

NewSouth Communications
Two North Main Street
Greenville, SC 29601
864-672-5000

EXHIBIT G

BellSouth Interconnection Services
675 West Peachtree N.E.
34S91
Atlanta, Georgia 30375

Jerry Hendrix
(404) 927-7503
Fax: (404) 529-7839

June 6, 2002

Jake E. Jennings
Vice President - Regulatory Affairs
NewSouth Communications Corp.
Two North Main Street
Greenville, SC 29601

Dear Jake:

This is in response to your letters of May 3rd and 23rd regarding BellSouth's audit of special access circuits converted to EELs.

Let me start by stating that BellSouth intends to pursue its right to audit NewSouth's converted EELs, those EELs ordered new under Attachment 2, Section 4.2.3, and any standalone special access circuits converted to UNEs consistent with the Parties' Confidential Settlement Agreement.

You are correct that the FCC's Supplemental Order Clarification Order states that: (1) audits will not be routine but will only be conducted under limited circumstances (i.e., when the ILEC has a concern that the local usage requirements are not being met); and (2) audits must be performed by an independent third party hired and paid for by the incumbent local exchange company. BellSouth has met both of these conditions. BellSouth does not audit EELs on a routine basis, rather it request audits only when it believes such an audit is warranted due to a concern that the local usage options may not be met. The fact that BellSouth may be conducting several audits currently is no indication that the audits are routine. In fact, BellSouth has not conducted any EEL audits in the two years since the Supplemental Order Clarification was released, and BellSouth is not requesting audits of any CLEC unless there is a concern as to compliance with the FCC's rules.

You are also correct that BellSouth did not state the reason for its desire to audit NewSouth circuits in its initial audit request. BellSouth has no obligation to disclose its reason for requesting the audit. However, BellSouth requested the NewSouth audit for two reasons. First, BellSouth records indicate that NewSouth has misreported its PIU/PLU factors in the past. In addition, and more importantly, NewSouth's traffic in Tennessee is primarily interstate (non-local) traffic according to BellSouth's records, yet NewSouth has represented to BellSouth that the traffic on its 280 EEL circuits in Tennessee, in large part, is local.

The auditor is an independent third party, who has no affiliation with BellSouth. Simply because BellSouth may be auditing other CLECs using the same third party auditor does not change the status of the auditor or BellSouth's affiliation with such auditor, or does it imply that any such audits are routine.

In regard to NewSouth's disagreement of the 20% threshold, you are correct that the Supplemental Clarification Order ("the Order") does not specify a 20% threshold finding of non-compliance to shift the burden for payment to NewSouth. In fact, per the language of the Order, there is no threshold level of non-compliance that must be met for the CLEC to become responsible for the cost of the audit. The Order provides that "incumbent LECs requesting an audit hire and pay for an independent auditor to perform the audit, and that the competitive LEC should reimburse the incumbent if the audit uncovers non-compliance with the local usage options." Therefore, any non-compliance would trigger the reimbursement obligation. However, to allow for unintentional errors, BellSouth has established a reasonable threshold under which no reimbursement will be necessary. In other contexts, BellSouth and NewSouth use a threshold of 20% as a reasonable standard. PIU audits described in BellSouth's tariffs specify the 20% threshold (see tariff attached). Further, the parties' Interconnection Agreement states that the party requesting the PIU or PLU audit will be responsible for the cost of the audit unless the audited party is found to have misstated the PIU or PLU in excess of 20% (see Attachment 3, Section 5.4). We believe such a proposal is reasonable and consistent with industry practice. Whether NewSouth agrees with this position should not affect whether NewSouth proceeds with the audit. BellSouth is the party responsible for paying the auditor, and reimbursement from NewSouth, if applicable, has no affect on whether the audit occurs in the first place. Unless non-compliance is found, this will be a moot issue.

Consistent with the May 9th meeting, I believe that your concerns about having to produce documents that would cause a financial burden on NewSouth have been resolved. All parties were in agreement that the documents used in NewSouth's normal course of business would be sufficient for purposes of the audit. Providing these records should not place an undue financial burden on NewSouth.

The Non-Disclosure Agreement ("NDA") that was sent was solely as protection to NewSouth. BellSouth is agreeable to proceeding under the confidentiality provisions set forth in the interconnection agreement rather than the NDA.

I trust that the foregoing has sufficiently responded to each of your issues and concerns. If you have any additional questions, please do not hesitate to contact me.

Sincerely,

Jerry Hendrix
Assistant Vice President
Interconnection Services

CC: Kyle Dixon, FCC (via electronic mail)
Matthew Brill, FCC (via electronic mail)
Jordan Goldstein, FCC (via electronic mail)
Dorothy Attwood, FCC (via electronic mail)
Michelle Carey, FCC (via electronic mail)
Jodie Donnovan-May, FCC (via electronic mail)

ACCESS SERVICE

2 - General Regulations (Cont'd)

2.3 Obligations of the Customer (Cont'd)

2.3.10 Jurisdictional Report Requirements (Cont'd)

(D) Audit Results for BellSouth SWA

(1) Audit results will be furnished to the customer via Certified U.S. Mail (return receipt requested). The Telephone Company will adjust the customer's PIU based upon the audit results. The PIU resulting from the audit shall be applied to the usage for the quarter the audit is completed, the usage for the quarter prior to completion of the audit, and the usage for the two (2) quarters following the completion of the audit. After that time, the customer may report a revised PIU pursuant to (A) preceding. If the revised PIU submitted by the customer represents a deviation of 5 percentage points or more, from the audited PIU, and that deviation is not due to identifiable reasons, the provisions in (B) preceding may be applied.

(2) Both credit and debit adjustments will be made to the customer's interstate access charges for the specified period to accurately reflect the interstate usage for the customer's account consistent with Section 2.4.1 following.

(3) If, as a result of an audit conducted by an independent auditor, a customer is found to have over-stated the PIU by 20 percentage points or more, the Telephone Company shall require reimbursement from the customer for the cost of the audit. Such bill(s) shall be due and paid in immediately available funds 30 days from receipt and shall carry a late payment penalty as set forth in Section 2.4.1 following if not paid within the 30 days.

EXHIBIT H

BELLSOUTH

BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30075

Jerry D. Hendrix
Assistant Vice President

(404) 927-7503
Fax (404) 529-7839
e-mail: jerry.hendrix@bellsouth.com

June 27, 2002

VIA ELECTRONIC AND OVERNIGHT MAIL

Jake Jennings
Vice President of Regulatory Affairs
NewSouth Communications, Corp.
NewSouth Center
Two N. Main Street
Greenville, SC 29601

Dear Jake:

This letter is to follow up on my June 6 letter to you. I attempted in that letter to address all the expressed concerns of NewSouth with the audit of NewSouth's EELs and standalone special access circuits converted to EELs. As you have not responded, I assume that NewSouth is agreeable to proceeding with the audit immediately. ACA's audit team will commence the audit at New South's offices in Greenville on July 15. We expect that the audit will take two weeks to complete. Thus, we request that NewSouth plan for ACA to be on-site for two weeks. Our audit team will consist of 3 auditors and an ACA partner in charge.

Please supply conference room arrangements at your facility. The auditors will also need the capability to read your supporting data, however you choose to provide it (file on PC, listing on a printout, etc.).

If you have any questions regarding the audit, please contact Shelley Walls at (404) 927-7511. Thank you for your cooperation.

Sincerely,

Jerry D. Hendrix
Assistant Vice President

cc: Larry Fowler, ACA (via electronic mail)
Sr. Vice President of Network Planning & Provisioning, NewSouth (via U.S. mail)

EXHIBIT I

NewSouth communications®

June 29, 2002

Via Electronic and Overnight Delivery

Mr. Jerry Hendrix
BellSouth Telecommunications
Interconnection Services
675 W. Peachtree St., NE
Room 34S91
Atlanta, GA 30375

Dear Jerry,

This letter is in response to your letters of June 6 and June 27, 2002 regarding, as you state in the opening line of your June 6, 2002 letter, "BellSouth's **audit of special access circuits converted to EELs**" (emphasis added). As an initial matter, I wish to point out that BellSouth has no right to audit new EELs ordered or any standalone UNE loops currently in use by NewSouth, as the FCC's use restrictions do not apply to them and FCC Rule 51.309 (a) affirmatively prohibits BellSouth from imposing use restrictions on UNEs.

Let me further state that your assumption that NewSouth is agreeable to proceeding with the proposed audit immediately is not correct. In addition to failing to satisfy NewSouth's concerns on the threshold issues identified in NewSouth's May 23, 2002 letter, you have now added a new issue that requires resolution prior to commencement of the audit – scope.

With regard to the issue of whether BellSouth is seeking to conduct "routine" audits in violation of the FCC's *Supplemental Order Clarification*, NewSouth now views this as a legal issue currently pending before the FCC in CC Docket No. 96-98. NewSouth has followed the proceedings related to the NuVox Petition with great interest. In particular, we have reviewed BellSouth's Opposition and ex parte filings and remain convinced that BST had commenced a series of routine audits in violation of the FCC's order. NewSouth will file comments in that docket as scheduled further setting forth our views on this issue.

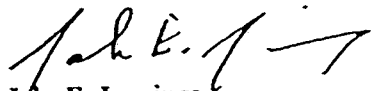
With respect to the FCC's requirement that BellSouth not undertake any audit but for a "concern" regarding compliance with the safe harbors, NewSouth finds your assertion that BellSouth need not disclose the concern to be contrary to the FCC's *Supplemental Order Clarification*. Now, with respect to BellSouth's alleged concern, NewSouth requests that BellSouth provide substantiation for both aspects of its allegations. If BellSouth has concerns regarding NewSouth's PIU/PLU reporting in Tennessee, it has requested the wrong type of audit. If BellSouth intends to audit converted EELs outside Tennessee, please provide substantiation for your concerns in those states as well.

With respect to the independent status of the proposed auditor, NewSouth also views this as a legal matter pending before the FCC. If BellSouth were willing to replace its selected auditor with one without such predominant ILEC affiliations, NewSouth would welcome that change and would gladly consider the qualifications of a new auditor that does not have such obvious conflicts of interest. Otherwise, NewSouth believes it wasteful to argue the merits repeatedly in different fora and will submit its views on BellSouth's assertions regarding the independent status of ACA in comments that will be filed with the FCC next week.

Finally, NewSouth will accept BellSouth's proposed 20% noncompliance threshold for shifting reasonable costs of any audit of converted EEL circuits that may eventually be conducted. NewSouth considers this to be a good faith gesture as well as an invitation to BellSouth to consider some compromises of its own. Absent a significant change in position by BellSouth – on many fronts – I fear that we will not be able to resolve this dispute amicably.

I trust that the foregoing has refocused your attention on NewSouth's concerns regarding BellSouth's proposed audit. Please do not hesitate to contact me if and when you believe additional discussions on this matter would be useful.

Sincerely,



Jake E. Jennings
Vice President – Regulatory Affairs
NewSouth Communications

CC: Larry Fowler, BellSouth (Electronic Mail)
Amy Gardner, NewSouth (Electronic Mail)
John Heitman, Kelley Drye (Electronic Mail)

EXHIBIT J

BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30075

Jerry D. Hendrix
Assistant Vice President

(404) 927-7503
Fax (404) 529-7839
e-mail: jerry.hendrix@bellsouth.com

July 17, 2002

VIA ELECTRONIC AND OVERNIGHT MAIL

Jake Jennings
Vice President of Regulatory Affairs
NewSouth Communications, Corp.
NewSouth Center
Two N. Main Street
Greenville, SC 29601

Dear Jake:

This letter is in response to your June 29 letter.

Contrary to the assertions made in your letter, BellSouth has the right to audit new EELs converted from special access as well as converted EELs. BellSouth has made every effort not only to comply with the provisions of NewSouth's Interconnection Agreement regarding audits, but also to comply with all the FCC's rules regarding audits, even though the parties did not incorporate all such requirements into the Interconnection Agreement. In addition, BellSouth has offered to NewSouth conditions and restrictions above and beyond any found in the Agreement or the FCC rules, such as the 20% threshold for requiring reimbursement of the audit cost. Contrary to your assertion that NewSouth's acceptance of the 20% threshold is a good faith gesture on NewSouth's part, it is actually a good faith gesture of BellSouth's. We were hoping that NewSouth would act in good faith as well, but apparently that is not the case.

As for your specific complaints regarding the audit, first, the FCC's safe harbors apply to all EELs, although much of the discussion took place in the context of conversions. The FCC was concerned that "...permitting the use of combinations of unbundled network elements in lieu of special access services could cause substantial market dislocations..." (paragraph 7 the Supplemental Order Clarification). Paragraph 8 goes on to state that the FCC defined the safe harbors so that, "until we resolve the issues in the Fourth FNPRM, IXCs may not substitute an incumbent LEC's unbundled loop-transport combinations for special access services unless they provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer." A UNE combination could be used to substitute for special access services whether or not it is ordered as new or is converted.

Regardless, the Interconnection Agreement clearly applies the Supplemental Order Clarification to new EELs. Section 4.2.2 of Attachment 2, which discusses new EELs, says,

> Subject to Section 4.2.3 below, BellSouth will provide access to the EEL in the combinations set forth in 4.3 following. This offering is intended to provide connectivity from an end user's location through that end user's SWC to NewSouth's POP serving wire center. The circuit must be used for the purpose of provisioning telecommunications services, including telephone exchange services, to NewSouth's end-user customers. *Except as provided for in paragraph 22 of the FCC's Supplemental Order Clarification, released June 2, 2000, in CC Docket No. 96-98 ("June 2, 2000 Order")*, the EEL will be connected to NewSouth's facilities in NewSouth's collocation space at the POP SWC. NewSouth may purchase BellSouth's access facilities between NewSouth's POP and NewSouth's collocation space at the POP SWC.
> (emphasis added)

If the FCC's Order did not apply to new EELs, there would be no need to carve out an exception for option 3 of the safe harbors.

Second, as you are aware, the parties agreed in the discussions surrounding the Confidential Settlement Agreement that the standalone loops converted pursuant to that Agreement would be subject to the safe harbors. BellSouth agreed to NewSouth's proposed language on that subject in an effort to bring closure to the complaint. In that same spirit of compromise, BellSouth will drop the converted standalone loops from the audit and would appreciate NewSouth reciprocating with some substantive compromise.

In my June 6 letter, I asked that you contact me regarding any additional questions NewSouth had after I had addressed the issues you had raised in your May 23 letter. In the absence of any information from NewSouth to indicate what concerns might remain regarding those issues, BellSouth could only assume that NewSouth had no concern and was agreeable to the audit.

Your assertion that the issue of whether or not BellSouth is conducting "routine" audits is an open matter before the FCC is incorrect. The FCC is seeking comment on Nuvox's Petition for a Declaratory Ruling, but that Petition does not even ask the FCC to find that BellSouth is conducting routine audits. To the extent that it addresses this issue at all, it requests that the FCC specifically require an auditing carrier to notify the carrier to be audited of "a specific, bona fide and legitimately related concern regarding the requesting CLEC's conforming with local usage criteria" at the time notification for an audit is provided. BellSouth has done so with NewSouth.

Your letter asks for substantiation of BellSouth's concerns. First, BellSouth has had issues with NewSouth in the past regarding its ability to appropriately jurisdictionalize traffic it sends to BellSouth. In light of those past difficulties, it is more than reasonable to question NewSouth's self-certification of the amount of local traffic on the circuits in question. Second, traffic studies show that NewSouth's traffic in several states is largely non-local. In South Carolina, 75% of all NewSouth's traffic is local; in Louisiana, only 66% of NewSouth's and 0% of Universal Communications' traffic is local; in North

Carolina, just 45% is local; and in Tennessee, only 38% of all NewSouth's traffic is local. Yet, NewSouth is claiming that, on these circuits, the traffic mix is substantially different than the statewide average. This is particularly a cause for concern for circuits that were certified under the fourth option negotiated into NewSouth's Interconnection Agreement, which requires that 75% of all the traffic on a circuit is local. There are currently 68 such circuits in North Carolina, 86 in South Carolina, and 106 in Tennessee. It is reasonable and efficient to audit the circuits even in those states where this does not appear to be the case while the auditor is available and on-site. In addition, your agreement is a nine-state, regional agreement. It does not require that the audits be conducted on a state-by-state basis, nor do the FCC rules contain such a requirement.

Your claim that the independence of the specific auditor BellSouth has is an open matter before the FCC is also incorrect. The Nuvox Petition asks that the FCC institute new rules regarding the information to be provided regarding the auditor at the time notice of the audit is given. The fact that the FCC is considering Nuvox's request has no bearing on the rules in place today, which do not require the parties to agree to the auditor. BellSouth has complied with the FCC's Supplemental Order Clarification and has hired an independent auditor. If, based on the results of the audit, NewSouth suspects some impropriety on the part of the auditor, it may dispute the auditor's findings and may assert and attempt to prove that the auditor is not independent. At this point, there is no legitimate basis for objecting to ACA. If NewSouth seriously considers prior employment at an ILEC to automatically establish bias against CLECs, then perhaps it should more carefully examine its own staff.

I sincerely hope that our companies can amicably resolve any issues that remain within the next few days, or at least agree that any potential differences are more properly addressed after the audit in the even that they become an issue. In the event that NewSouth does not begin to cooperate with the audit as required by the Interconnection Agreement, BellSouth will have no choice but to interpret it as a material breach of contract and will be forced to take the appropriate steps. If you have any questions regarding the audit, please contact Shelley Walls at (404) 927-7511.

Sincerely,

Jerry D. Hendrix
Assistant Vice President

cc: Larry Fowler, ACA (via electronic mail)
Sr. Vice President of Network Planning & Provisioning, NewSouth (via U.S. mail)

EXHIBIT K

NewSouth communications

August 7, 2002

Sent Via Electronic and US Mail

Mr. Jerry Hendrix
BellSouth Interconnection Services
675 West Peachtree St., NE
Room 34S91
Atlanta, GA 30375

Dear Jerry:

This letter is in response to your July 17, 2002 letter.

Please allow me to start by pointing out your own confusion as BellSouth tries to segue into its newly minted and unlawful policy of trying to impose use restrictions on new EELs in addition to those converted from special access. You open your letter with: "Contrary to the assertions made in your letter, BellSouth has the right to audit new EELs converted from special access as well as converted EELs." We agree that BellSouth has a limited right to audit EELs converted from special access. To avoid confusion, however, we do not refer to them as "new EEL*s*". We reserve that moniker for new combinations made available pursuant to various state commission orders and not on account of FCC Rule 315(b) and the temporary use restrictions appended to conversions from special access that the FCC adopted in the *Supplemental Order* and *Supplemental Order Clarification*.

Next, you assert that BellSouth has offered "conditions and restrictions above and beyond any found in the Agreement and the FCC rules." We agree with this assertion, and therein lies much of your problem. While we have come to an agreement on the 20% noncompliance threshold for requiring reimbursement of audit expenses, we simply do not agree to BellSouth's attempt to go "above and beyond" the limited audit rights afforded to it under the *Supplemental Order Clarification* and the Agreement.

Closing out my response to your first paragraph, allow me to note that I do not take your accusation that NewSouth has not acted in "good faith" lightly. NewSouth certainly has acted in good faith. Indeed, we have expended far too many resources simply exchanging letters with you on this matter. Nevertheless, we are committed to investing in the business relationship we have with BellSouth and will continue to express a preference for dialogue and compromise over rhetoric and litigation. Nevertheless, I do note that by your own admission, BellSouth has attempted to go "above and beyond" its limited right to audit and, if anything in our companies' discourse on this issue could be considered to be in bad faith, that surely would be it.

NewSouth Communications
Two North Main Street
Greenville, SC 29601
www.newsouth.com

Moving to the more substantive assertions made in your letter, let me state plainly that your assertion that "the FCC's safe harbors apply to all EELs" is wrong. Indeed, the FCC declined to address new combinations in its *UNE Remand, Supplemental Order,* and *Supplemental Order Clarification.* Thus, the temporary use restrictions adopted in the latter two orders apply solely to special access-to-EEL conversions. Moreover, neither those restrictions nor any aspect of them apply to stand-alone UNEs. BellSouth's attempt to extend the FCC-imposed use restrictions is unlawful, as FCC rules strictly prohibit an ILEC from imposing *any* use restrictions.

I also object to your proposed misinterpretation of the interconnection agreement. The language you reference was added because BellSouth sought to add a collocation requirement as a condition for EEL availability, in general. NewSouth agreed to the collocation requirement but wanted to preserve the option of using safe harbor number three, which, for certain conversions from special access to EELs, does not require collocation. The language of Section 4.2.2 of Attachment 2, clearly reflects that this is the case. In short, the reference to paragraph 22 of the *Supplemental Order Clarification* serves simply to indicate that there is an exception to the collocation condition that NewSouth graciously agreed to. The exception is for special access circuits converted to EELs under safe harbor option three.

Notably, the Agreement does incorporate the FCC's safe harbors in Section 4.5.1. and 4.5.1.2 which addresses special access service conversions to UNE combinations. New EELs are addressed in Sections 4.2.3 and 4.2.4 and are clearly not subject to any use restrictions.

Now, with respect to special access converted stand alone UNE loops pursuant to the Confidential Settlement Agreement, we clearly disagree. UNE loops are not subject to use restrictions. Nevertheless, since you have dropped your request to audit stand alone UNE loops, we need not spill more ink on it at this time.

As you know, NewSouth agrees with numerous other CLECs' position that the rash of audit requests issued by BellSouth constitute a deviation from the limited audit rights granted to BellSouth by the FCC. Notably, the stream of audit requests seemed to come to a halt only after NuVox filed its Petition. While I do not believe this was a mere coincidence, I will wait for the FCC to decide.

With respect to your stated concern that triggered your audit requests, I note that if BellSouth has concerns with NewSouth's jurisdictionalization of traffic, we should identify and address those concerns separately, as such jurisdictional reporting has no bearing on the individual circuits BellSouth seeks to audit here. Now with respect to the traffic studies you mention, it seems to me that in all cases, your studies confirm that NewSouth's traffic includes a significant amount of local traffic in each state you discuss. Your assertion that NewSouth's traffic in several states is "largely non-local" has nothing to do with the "significant local use" restrictions imposed by the FCC on conversions of special access to EELs. Nevertheless, if you continue to believe that your traffic studies are probative of compliance, perhaps you can provide more detail about the studies (was it limited to converted EELs?, what was the timeframe during which it was

conducted?) and additional explanation regarding why you believe that they are relevant and trigger a concern regarding compliance in each state for which you have requested an audit (NewSouth will not permit BellSouth to proceed with an audit in any state where it does not have a legitimate concern regarding compliance).

Regarding the independent status of the auditor selected by BellSouth, again, we disagree. ACA does not meet the AICPA standards and cannot reasonably be deemed "independent". Neither the NuVox Petition nor NewSouth's Comments and Reply Comments in support of it contain an assertion that any ILEC employment establishes bias, as you disingenuously suggest. Your gross misrepresentation of the NuVox Petition in this regard, simply underscores that BellSouth has no legitimate basis for asserting that ACA – an ILEC consulting shop comprised of principles who have had prior careers with ILECs and now rely on a nearly all ILEC client base and who pitch their ability to generate revenues for ILECs via audits – is independent. BellSouth can and should choose an independent auditor, as required by the *Supplemental Order Clarification*.

As always, NewSouth would prefer an amicable resolution of disputes between the parties. However, we remain far apart on core issues that may best be settled by the FCC. In the meantime, NewSouth invites BellSouth to take "appropriate steps" to bring its audit request into compliance with the limitations established by the FCC. Please call or write, if you would like to discuss those steps with NewSouth.

Sincerely,

Jake E. Jennings
Vice President, Regulatory Affairs

CC: Larry Fowler, BellSouth *(Electronic Mail)*
Amy Gardner, NewSouth *(Electronic Mail)*

EXHIBIT L

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In the Matter of BellSouth Telecommunications, Inc., Petitioner	)	
v.	)	**Docket 2004-0063-C**
NewSouth Communications Corp., Respondent	)	

AFFIDAVIT OF JAKE E. JENNINGS ON BEHALF OF NEWSOUTH COMMUNICATIONS CORP.

I, Jake E. Jennings, of lawful age, hereby declare and state the following under penalty of perjury of law:

1. I am currently Senior Vice President of Regulatory Affairs and Carrier Relations of NewSouth Communications Corp. ("NewSouth") and have been employed by the company since October of 2000. In my capacity as Senior Vice President I have had an integral role in preparing, developing, and implementing NewSouth's business plan, negotiating and implementing interconnection agreements with incumbents, and managing intercarrier relations. I am familiar with the disputes between NewSouth and BellSouth Telecommunications, Inc. ("BellSouth") detailed in this Complaint.

2. NewSouth is a Delaware corporation with its principal place of business at Two North Main Street, Greenville, South Carolina, 29601, (864) 672-5877.

3. NewSouth is an integrated service provider offering local and long distance voice and data services primarily to small and mid-sized businesses throughout BellSouth's service territory in the Southeast, specifically Alabama, Georgia, Florida, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

NewSouth's service offering to customers includes the provision of local services to its customers. NewSouth is thus in the business of providing local service. NewSouth provides these services via a high-speed network consisting of the following main elements: (1) self-deployed voice and data switches; (2) multiplexing and related equipment located in 80 collocation arrangements; (3) back office billing and customer care platforms; (4) electronic operation support system bonding; and (5) leased intercity/interLATA fiber backbone. NewSouth connects this network to customers through BellSouth (and other incumbent LEC facilities), specifically using: (1) BellSouth facilities between a NewSouth collocation site and the customer's premises either in the form of unbundled DS1 loops and/or EELs or special access; and (2) transport from the collocation site to a NewSouth switch utilizing backhaul facilities on incumbent LEC non-UNE facilities or alternative third-party providers where available.

4. I am submitting this affidavit in response to the allegations that form the basis of BellSouth's audit claim

5. BellSouth has never demonstrated any concern justifying right the audit of enhanced extended loops ("EELs") obtained by NewSouth. BellSouth proffers two bases for its alleged "concern" that NewSouth's EELs are not in compliance with eligibility criteria. First, BellSouth claims that it "has previously had issues with NewSouth regarding NewSouth's inability to appropriately jurisdictionalize traffic it sends to BellSouth." BellSouth Complaint ¶ 45. In its June 6, 2002 letter (NewSouth Answer, Exh. G), BellSouth states that its "records indicate that NewSouth has misreported its PIU/PLU factors in the past." June 6, 2002 BellSouth Letter at 1, Exh. G.

6. Second, BellSouth claims that certain unidentified traffic studies "show that the traffic NewSouth passes to BellSouth in several states is largely non-local." BellSouth Complaint ¶ 45. BellSouth's July 17, 2002 letter states that "[i]n South Carolina, 75% of all NewSouth's traffic is local; in Louisiana, only 66% of NewSouth's and 0% of Universal Communications' traffic is local; in North Carolina, just 45% is local; and in Tennessee, only 38% of all NewSouth's traffic is local." July 17, 2002 BellSouth Letter at 2-3, Exh. J; *see also* Hendrix Affidavit ¶ 12, BellSouth Complaint, Exh. E. BellSouth argues that this demonstrates a concern because NewSouth allegedly certified that "the traffic mix on [the EEL] circuits is substantially different than the traffic studies would suggest." *See, e.g.,* BellSouth Complaint ¶ 45.

7. BellSouth's purported evidence is wrong factually and in what it purports to show.

8. BellSouth has failed to provide any detail to support its conclusory allegation that NewSouth has in the past had an "inability to appropriately jurisdictionalize traffic." BellSouth Complaint ¶ 45. NewSouth thus does not know the basis of BellSouth's allegation. BellSouth has provided NewSouth no information regarding when the alleged misreporting is supposed to have occurred or what traffic was involved. BellSouth nowhere alleges that this purported inability to jurisdictionalize traffic is related in any way to traffic carried over EELs circuits. NewSouth is simply at a loss to understand the basis of this allegation.

9. NewSouth in fact is aware of only one instance in which any issue arose with respect to the jurisdictional factors it provides to BellSouth. In early 2002,

NewSouth began providing percent local usage ("PLU") and related factors to BellSouth based on the formulas and guidance provided by BellSouth. Following the submission of the PLU factor report for the first quarter of 2002, NewSouth itself noticed that it may have misapplied BellSouth's formulas. NewSouth then contacted BellSouth to obtain further understanding of BellSouth's formulas. Based on discussion with BellSouth, it turned out that NewSouth had actually *underreported* the amount of local traffic. NewSouth self-corrected the factors in the following quarter. NewSouth has filed quarterly PLU reports since then without any questions being raised.

10. BellSouth has also refused to provide NewSouth any information on the traffic studies that it claims demonstrate a concern, despite NewSouth's request. For example, in my letter of August 7, 2002 to Mr. Hendrix, I pointed out that there was no indication that the traffic studies were limited to converted EELs, when the traffic studies took place, or where and how the studies were performed. *See* August 7, 2002 NewSouth Letter at 2-3, Exh. K. Moreover, BellSouth does not indicate how it measured local traffic in those studies. For purposes of NewSouth's compliance with the EELs eligibility requirement of significant local usage, "local" is defined as calls that originate and terminate in the LATA. This is because the *Supplemental Order Clarification*[1/] defines local with reference to how that term is defined in the parties' interconnection agreements,[2/] and the parties' agreement here defines local as intraLATA calls.[3/] There

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1/ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*"), *aff'd sub nom. CompTel v. FCC*, 309 F.3d 3 (D.C. Cir. 2002).

2/ *Supplemental Order Clarification* n.64 ("Traffic is local if it is defined as such in a requesting carrier's state-approved local exchange tariff and/or it is subject to a reciprocal compensation arrangement between the requesting carrier and incumbent LEC.").

is no indication that BellSouth's traffic studies on which BellSouth based its allegation that NewSouth's traffic was "largely non-local" properly defined local as intraLATA calls as required by the *Supplemental Order Clarification* and the parties' agreement.

11. Even if the levels of local traffic ostensibly found in BellSouth's traffic studies are accurate, which is impossible to verify since BellSouth will not provide the underlying data, the traffic studies could not possibly form the basis for a legitimate concern that NewSouth's EELs are not in compliance with the applicable eligibility criteria. As noted at Paragraph 45 of NewSouth's Answer, the eligibility criteria applicable to all the circuits at issue require only that at least ten percent of the traffic over the circuits be local – or in this case intraLATA. *See* NewSouth Answer ¶ 45. This is because all of the circuits at issue were converted pursuant to Option 2 of the *Supplemental Order Clarification*. For DS1 circuits, which is the type of circuit NewSouth orders from BellSouth, Option 2 requires that "at least 50 percent of the activated channels on the loop portion of the loop-transport combination have at least 5 percent local voice traffic individually, and the entire loop facility has at least 10 percent local voice traffic." *Supplemental Order Clarification* ¶ 22 (footnote references omitted). As a practical matter, for the channelized DS1 circuits utilized by NewSouth, compliance with the Option 2 criteria only requires that ten percent of the traffic over the DS1 loop be local.

3/ Section 5.1.1, Agreement, Att. 3 ("For reciprocal compensation between the Parties pursuant to this Attachment, Local Traffic is defined as any telephone call that is originated by an end user of one Party and terminated to an end user of the other Party within a given LATA on that other Party's network, except for those calls that are originated or terminated through switched access arrangements."), *found at* http://cpr.bellsouth.com/clec/docs/all_states/80058b9a.pdf.

12. The purported levels of local traffic cited by BellSouth show percentages of local traffic orders of magnitude above that which is required by the applicable eligibility standard. In North Carolina, for example, BellSouth's traffic studies purport to show that 45 percent of NewSouth traffic is local, more than four times the amount of local traffic required by the applicable eligibility criteria. *See, e.g.*, Hendrix Affidavit ¶ 12, BellSouth Complaint, Exh. E. BellSouth's traffic studies are even higher in other states, for example, 75 percent in South Carolina and 66 percent in Louisiana. *See, e.g.*, Hendrix Affidavit ¶ 12, BellSouth Complaint, Exh. E. The results of these alleged studies, even if accurate, actually show a substantial amount of local traffic, and are diametrically at odds with BellSouth's facially false assertion that these studies show that traffic "is largely non-local." *See, e.g.*, BellSouth Complaint ¶ 45. At any rate "largely non-local," is not the applicable standard – ten percent local usage is the applicable standard.

13. Only in one instance do BellSouth's alleged traffic studies purport to show less than ten percent local traffic. BellSouth claims that "0% of Universal Communications' traffic is local" in Louisiana. *See, e.g.*, Hendrix Affidavit ¶ 12, BellSouth Complaint, Exh. E. BellSouth, however, fails to identify Universal

Communications or explain why its traffic is at all relevant.

14. This concludes my affidavit.

Jake E. Jennings

Affirmed to before me this
17th day of April, 2004

Notary Public.

My Commission Expires July 8, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **NEWSOUTH COMMUNICATIONS CORP.'S ("NEWSOUTH'S") ANSWER AND OPPOSITION TO BELLSOUTH TELECOMMUNICATION, INC.'S COMPLAINT AND REQUEST FOR SUMMARY DISPOSITION AGAINST NEWSOUTH COMMUNICATIONS CORP.** by depositing a copy of the same in the United States Mail, postage prepaid, in an envelope properly addressed as follows:

Patrick W. Turner, Esq.
BellSouth Telecommunications, Inc.
1600 Williams Street, Suite 5200
Columbia, South Carolina 29201
(803) 401-2900
patrick.turner@bellsouth.com

This 7th day of April, 2004.

John J. Pringle, Jr., Esq.

WDC 347850v5